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ABSTRACT

This monograph is a revision of an earlier edition designed to help school boards handle terminations of employment while reducing the likelihood of litigation arising from terminations. The former set of five procedural codes have been updated, modified, and added to. This edition contains six model procedural codes on which school boards can base policies covering (1) nonrenewal of probationary teachers' contracts; (2) grounds for dismissal of teachers; (3) teacher dismissal procedures; (4) reductions in force caused by enrollment decline, financial exigency, or program changes; (5) dismissal of a superintendent with a contract for a specified term; and (6) dismissal of assistant or associate superintendents with contracts for specified terms. Each code is made up of sections, each of which is followed by comments explaining or clarifying the section's intent. To serve as a practical model, the code is supplied with some optional sections and optional phrases within sections to provide alternatives for the policy-maker. The codes themselves are written with the statutory requirements of North Carolina in mind, and readers are urged to review their own state laws and regulations to determine revisions that will need to be made for their locations. Appendixes provide forms to be used in conjunction with the codes in dismissal or nonrenewal proceedings. (PGD)

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Nonreappointment, Dismissal, and Reduction in Force of Teachers and Administrators

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Introduction

The issues of employee nonreappointment, discharge, and reduction in force are among the most difficult that educational institutions face, from both a human and a legal standpoint. They also are the most frequently litigated issues. In 1972, to help educational boards with terminations of employment and to reduce the likelihood of litigation arising from terminations, the Institute of Government published the first edition of this monograph, which contained a set of five procedural codes and accompanying forms. These codes now need to be updated, modified, and added to. This new book expands on the discharge-for-cause procedure, completely restructures the nonreappointment procedure, and adds a new procedure on reduction in force. North Carolina boards of education that adopted a discharge-for-cause policy based on the 1972 recommended codes will now need to amend their policy to reflect the changes made to the North Carolina Tenure Act, on which these codes are based. The other three codes that were in the 1972 edition—nonreappointment and discharge of superintendents and assistant superintendents—were based on no particular statute. Nevertheless, changes have been made to each of them, and boards with such policies, whether based on the 1972 codes or not, will want to consider the ways in which the policies recommended in these new codes differ from their existing policies. The reduction-in-force code is completely new. The appendix contains the forms to be used with the codes.

A note of caution: When a board uses these codes or sample procedures as a guide to drafting its policy on termination, it should determine whether any part of the models conflicts with the statutes or state board of education regulations in its state or with the unit's collective bargaining contract. To the extent that these proposed procedures conflict, either they must be modified or changes must be obtained in the statute, regulation, or contract. North

Carolina boards will find no conflict between these codes and either the state statutes or State Board of Education regulations.

Each code is made up of sections that are followed by comments that explain or clarify their intent. In several cases the comments are essential to the meaning of the section and should be adopted with it if the section is adopted. At times, however, the comments only explain the sequence or purpose of the state statutory section and should be omitted if the section is adopted. If you are uncertain whether a comment should be retained, retain it and ask your board attorney to review the entire proposed policy carefully.

Optional sections and optional phrases within sections are provided when a reasonably attractive alternative exists. These alternatives appear in brackets. In some instances the alternative is a replacement for, rather than an elaboration of, the provision being considered. In these places, the original provision appears in italic.

To develop procedures for nonreappointment, dismissal, or laying-off of the school's professional employees, I recommend that the school board direct a committee of administrators and board members to draft policies for the board's consideration. In the 1972 version of this monograph I recommended that this committee include teachers. Experience has proved that to be a mistake. Teachers and their professional associations should have an opportunity to react to the draft and present their point of view to the committee and the board before final adoption, but the draft should be a responsibility of management. The committee should use these codes as a guide, but it should decide for itself the policies that are best for its school system. The regulations must of course comply with statutory and constitutional requirements, and the school board attorney should advise the committee in its work. The committee's final draft should go to the school board for its consideration, amendment, and final adoption as official board policy. Once the procedural codes are adopted, the board should give a copy to each school employee covered by it and to each new employee when he or she is hired.

When these things have been done, local boards of education should have clear procedures for the nonreappointment, dismissal, and layoff of the school's professional employees. These procedures, when followed, not only will satisfy the statutory requirements of the tenure act and the constitutional requirements of due process but also will go far in assuring that school employees are treated fairly.

Code I

Nonrenewal of a Probationary Teacher's Contract

In *Roth v. Board of Regents*[1] the United States Supreme Court made it clear that a public employer may choose not to give an employee a new contract—i.e., not reappoint the employee to a new term—for any reason that is not based on the employee's exercise of constitutional rights or his race, religion, sex, or national origin. Because the Court found no constitutionally protected property right in re-employment, the Fourteenth Amendment of the federal Constitution does not apply, and thus no procedural due process (that is, it is not required that the board give a statement of reasons and a hearing on the nonreappointment) need be given because of the nonreappointment. Due process is required only when a liberty interest protected by the Fourteenth Amendment is violated (that is, when the teacher is denied the right to free speech or is stigmatized). If the teacher can establish a prima facie case[2] that a constitutionally impermissible reason was the basis for the nonreappointment or that the school administration or board has stigmatized him in the way it handled the nonreappointment, then and only then is the board required both to explain why it did not reappoint and to give the teacher a hearing on the nonreappointment.

Although the federal Constitution has been interpreted as not requiring that a board give a nonreappointed teacher either the reasons for the nonreappointment or a hearing, a state statute or a board's collective bargaining contract may require such procedures. If so, the board must comply with these requirements. Most school boards will not face such

1. 408 U.S. 564 (1972). *Accord*, Still v. Lance, 275 N.C. 254, 182 S.E.2d 403 (1971).

2. The teacher establishes a prima facie case when the evidence in his favor is strong enough that the administrator or board should be called on to answer it. It is evidence by the teacher that proves that nonreappointment was impermissibly based if evidence to the contrary is not produced.

requirements, but a board may nevertheless decide that it is good policy to give some explanation of its decision and an opportunity to discuss the decision when the teacher requests it. The model code in this booklet recommends that boards adopt a limited review procedure that includes a conference and a board hearing in certain circumstances even when none is required. There are several reasons for this recommendation. First, a conference and a hearing give an opportunity to correct any misinformation on which the decision was based. Second, they allow the board to reverse a wrong decision at an early stage if it finds that its decision not to reappoint was based on an impermissible ground. Third, these steps usually reduce the likelihood of litigation because the teacher has been given an opportunity to show how the recommendation and/or decision was impermissibly based. Of course, if the principal has been thorough and frank in his evaluation, the decision should come as no surprise to the teacher.

Even more important to promoting excellent teaching than a good review procedure is a commitment on the part of principals, superintendents, and boards to culling poor and even average probationary teachers when better teachers are available. Administrators and boards should approach the nonreappointment decision with this goal in mind. The basis on which most civil service re-employment decisions are made is that if the worker is not clearly incompetent or otherwise unsuitable, he is continued in employment. This is questionable policy for any employer, but it is disastrous for public schools. Because excellent teachers and administrators are essential if the schools are to be first rate, a teacher should not be re-employed unless he has demonstrated the potential to be excellent or at least as good as any candidate in the available pool for his field. This is a radical concept to many public school people, but it is the basis for employment and re-employment decisions in schools that seek excellence.

As a corollary to this principle, a school should take the first opportunity to separate a mediocre teacher. As soon as possible after it learns that a probationary teacher is unlikely to become an excellent teacher, a school should terminate him. Many schools assume that once the teacher is hired, he has three years to demonstrate the potential to be a good teacher. School administrators should reject this idea. Most mistakes in selection can be identified in the first year of employment, and the sooner the mediocre teacher is recognized and removed from the classroom, the better the school will be. It is exceedingly unlikely that a poorly prepared, unmotivated person can become an excellent teacher. Therefore, most nonreappointment actions should be taken in the first rather than the third year of employment.

The single most important way to improve the quality of teaching is to take great care in the initial employment decision. Unfortunately, the overwhelming majority of educational institutions—both public school and postsecondary institutions—do not go through the careful screening, scrutinizing, and

checking that are necessary to insure that the applicant chosen is the best available. The time, money, and effort spent during the selection process in screening out all but the best candidates will save much time, money, and effort that the school would otherwise spend in working with a teacher who should never have been employed and is eventually denied reappointment or discharged. Even more important, high standards in selecting teachers assures the students the best learning opportunity.

Basis for Nonrenewal of a Contract

I recommend that the board adopt as part of its nonreappointment policy a statement of the bases on which reappointment and tenure will be decided. The statement should be general, not specific. For example, it might state that reappointment and tenure may be denied on any grounds other than those specifically stated to be impermissible and that conferral of tenure requires an assessment of school needs and resources and evidence of the teacher's service to the school, potential for future contribution, commitment to the welfare of students and the school, and demonstrated professional competence. This document should not be more specific. It should not, for example, be a restatement of the school's evaluation instrument that lists areas of performance on which its teachers are to be judged—e.g., preparation for classes, ability to relate to students, cheerfulness, etc. It is extremely important that the board and its administrators not be limited to specific evaluation criteria in deciding on tenure. The board should be able to not reappoint even a teacher who has received good ratings if a better teacher is obtainable or if it decides that it needs a teacher in another field more than it needs this teacher. It should therefore avoid adopting a checklist of criteria for reappointment or suggesting in its personnel policy that tenure can be earned simply by performing adequately in specified areas. The school needs to be able to dispense with even an above-average untenured teacher if it has a reasonable chance of employing an even better teacher for that position. It should not put itself in the position of having to defend its judgment and prove why the merely average teacher does not have the potential to become an excellent teacher as it strives constantly to upgrade the quality of its teaching faculty.

The board's personnel policy should also set out the impermissible grounds for basing a decision not to reappoint. In addition to the constitutionally impermissible reasons already discussed, the board will need to add any impermissible grounds set out in its state's statutes or its collective bargaining contracts. For example, North Carolina law [G.S. 115C-325(m)(2)] provides that the board's decision not to renew a nontenured teacher's contract may not be "arbitrary, capricious, discriminatory, or for personal or political

reasons."[3] Thus these limitations have been included in the paragraph below. If your state's statutes impose no such limitations, I recommend that your board add "personal malice" rather than "arbitrary and capricious" to the constitutionally impermissible reasons on which nonreappointment may not be based. "Personal malice" is preferable to the "arbitrary and capricious" standard required by the North Carolina statute because it is narrower and will let stand a nonreappointment that could perhaps be characterized as arbitrary although the board would not have reappointed even if the arbitrary aspect was removed. This distinction is consistent with the Supreme Court's decision in *Mt. Healthy v. Doyle*[4]—that even if a teacher can show that the board based its decision not to reappoint him in part on constitutionally protected conduct, the board's decision will be sustained if it can show "by a preponderance of the evidence that it would have reached the same decision, even in the absence of the protected conduct."

Section 1. *Permissible and Impermissible Grounds for Nonreappointment.* The _____ Board of Education, upon the superintendent's recommendation, may decline to renew the contract of any nontenured "professional" employee who has been employed in a tenurable position (this person is hereinafter referred to as teacher) for any cause it deems sufficient. In assessing the person for reappointment, the school administrators and the board may take into account and use as the basis of the recommendation or decision not to reappoint, in whole or in part, any factors deemed relevant to total institutional interests. But the recommendation to the board and the board's decision may not be (1) arbitrary, capricious, or discriminatory or for personal or political reasons; (2) based primarily on the teacher's exercise of rights of freedom of speech guaranteed by the First Amendment to the United States Constitution or by Article 1 of the North Carolina Constitution; or (3) based on the teacher's race, religion, sex, or national origin.

> **Comment:** The decision not to rehire a probationary teacher is a discretionary act, but the board's discretion is limited by the constitutional restraints noted in the *Roth* and *Mt. Healthy* decisions and by collective bargaining contracts or statutes. For example, in North Carolina, G.S. 115C-325(m)(2) prohibits refusal to re-employ on grounds that are "arbitrary, capricious, discriminatory or for personal or political

3. The Fourth Circuit has more than once rejected the contention that this statutory limitation on nonreappointment establishes a property interest under the Fourteenth Amendment that requires the board to give reasons and a hearing on why it did not reappoint the teacher. Sigmon v. Poe, 564 F.2d 1093 (4th Cir. 1977); and Satterfield v. Edenton-Chowan, 530 F.2d 567, n. 4 (4th Cir. 1975).

4. 429 U.S. 274 (1977), digested in 8 SCHOOL LAW BULL (April 1977).

reasons." Essentially, it requires that the board and the superintendent act in good faith in deciding not to renew the contract.

This code is intended to apply to all teachers, principals, and "professional" staff people such as central office supervisors, assistant superintendents, librarians, psychologists, etc. The term used in this code—any "professional" nontenured employee who has been employed in a tenurable position—should be defined in your policy by specifying each type or category of employee to be covered. This policy should not be made to apply to noncertified personnel—e.g., secretaries, cafeteria workers, bus drivers, janitors, etc. A separate policy should be developed for them.

Section 2. *Notice of Nonrenewal.* If the teacher's immediate supervisor (hereinafter called principal) decides to recommend to the superintendent that the teacher's contract not be renewed for the next school year, the principal shall give the teacher a simple, unelaborated, written statement of the recommendation. The principal shall give this notice no later than _____ so that the board of education can give timely notice of a final decision not to reappoint if it decides against reappointment. The notice also shall include a copy of the board's nonreappointment policy and procedure.

If the principal recommends reappointment but the superintendent disagrees, the superintendent shall give the teacher the notice provided above. If the superintendent recommends reappointment but the board decides not to reappoint, the board shall give the teacher the notice provided above.[5] The board's notice shall be given not less than 30 *school* [calendar] days before the last day of the current employment period.

Comment: The teacher's evaluator, which is usually the principal, is the key person in practically all nonreappointment decisions: His recommendation not to reappoint usually results in a superintendent's recommendation and a final board decision not to reappoint. Accordingly, it seems appropriate, if the school system is to have an internal review of the nonreappointment decision, that it begin right after the principal

5. The decision on reappointment is solely a board decision. Although a statute may provide that the board acts after receiving the superintendent's recommendation, as G.S. 115C-325(m)(2) does in North Carolina, the board is not required to reappoint a teacher even if the superintendent has recommended reappointment. *See* Taylor v. Crisp, 21 N.C. App. 359, 205 S.E.2d 102 (1974). But if the superintendent does not recommend reappointment, the board usually will not have the question of reappointment before it. Many state statutes provide that the board receives the names of teachers, principals, and other school personnel on a recommendation from the superintendent. The board then must decide whether to employ. *See* N.C. GEN STAT §§ 115C-276(j), -278, -284(b), -284(g), -299(a), and -315(a) for applicable North Carolina statutes.

decides to recommend nonreappointment and before the board has made a decision. If a conference between administrator and teacher and an opportunity to speak to the board are not given until after the board has decided not to reappoint (as I originally had written this procedure), the likelihood of a board's reversing a decision, whether it be wrong or wise, is reduced. My experience has been that boards are extremely reluctant to admit error and reverse their decisions. They are also loath to overturn their superintendent. (Most decisions not to reappoint are more administrative than board decisions—as they must and should be.) Thus this procedure provides for a conference and right to petition the board before rather than after the board has acted on the superintendent's recommendation.

This section requires the teacher's evaluator to give "a simple, unelaborated, written statement" of his recommendation not to reappoint. It is important that the evaluator not give written reasons because they create the risk of "stigmatizing" the teacher (thus invoking the due process requirement of the Fourteenth Amendment) and putting the school in the position of having either to prove the reasons or to reappoint the teacher.

The notice requirement on the board requires notice of at least 30 school days rather than calendar days because the North Carolina tenure act requires notice equaling 30 work days—excluding all Saturdays, Sundays, and legal holidays. It is possible that even some school days may not be counted. In a 1977 North Carolina trial court decision, the judge would not count Memorial Day even though school met on that day in order to make up a missed day (because of snow) because G.S. 103-4(a) provides that Memorial Day (and Easter Monday) "shall be a holiday for all State and national banks only."[6] School boards in other states that are not similarly limited by state statute should use calendar days.

Section 3. *Teacher's Request for a Conference.* Within five days after receiving the principal's or superintendent's written notice of his intention to recommend nonreappointment, a teacher may in writing request a private conference with the superintendent, if he contends that the recommendation was based on one of the grounds stated to be impermissible in Section 1. The superintendent may invite the teacher's principal and any other school administrator to attend the conference if he thinks their presence would be helpful.

If the teacher's written request does not specifically state that the recommendation was based on an impermissible reason, the superintendent shall

6. Copeland v. Orange County Bd. of Educ., 77 CvS 442, N.C. Super. Ct. (1977), digested in 9 School Law Bull. (January 1978). The court declared that the teacher had permanent tenure and permanently enjoined the school from failing to treat her as a tenured teacher, even though the school had given her 41 calendar days' notice that translated into 28 work days.

deny the request and immediately send his recommendation on reappointment to the board of education.

If the principal and the superintendent recommend reappointment but the board decides not to reappoint, there shall be no conference, but the teacher may request *permission to make a statement* [a hearing] before the board pursuant to Section 5.

> **Comment:** I originally wrote this section to provide that a teacher who received notice of nonreappointment had an absolute right to a conference with the superintendent. But school administrators have convinced me that giving the teacher a right to an explanation of why he was not reappointed will discourage school administrators from recommending the nonreappointment of a mediocre teacher when there is hope of employing a better teacher. Because the historic practice in public schools has been to re-employ and grant tenure unless the teacher is a "dud," I am convinced that a conference to discuss the reasons for the nonreappointment would undercut the thrust of this nonreappointment procedure, which is to encourage nonreappointment unless the school administrator thinks the probationary teacher is as good as the market will provide in the near future. Too many school administrators would recommend reappointment if they were forced to articulate at a conference why the teacher is only fair and not good enough to be retained. It is best that the principal not be required to explain or specify the reasons for a judgment based on intuition that the teacher will never be better than fair. Thus if the written request for a conference does not specifically allege that the recommendation was impermissibly based, a conference should not be held and the superintendent should send his recommendation to the board.
>
> No conference between principal and teacher is provided in this procedure because it is assumed that the school's evaluation procedure requires such a conference. If the principal has been a good evaluator, he already has had several discussions with the teacher about the teacher's performance and his decision to recommend nonreappointment usually should come as no surprise to the teacher.
>
> If the principal and the superintendent have recommended a teacher's reappointment but the board decides not to reappoint, the teacher's complaint is with the board, not the superintendent. Therefore, no conference between teacher and superintendent should take place.[7]

Section 4. *Conference.* The request for a conference shall be granted in accordance with Section 3 and the conference held forthwith, within five

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7. *See* Taylor v. Crisp, 21 N.C. App. 359 (1974), *aff'd*, 286 N.C. 488 (1975), for a decision upholding the board's right under the North Carolina Tenure Act to deny reappointment and tenure after the superintendent recommends it.

days after the superintendent receives the teacher's request if possible. At the conference the superintendent, with the other school administrators whom the superintendent has asked to attend, shall consider the teacher's contention that the recommendation was impermissibly based. The superintendent shall fully examine the contention and, if such a course would be helpful, investigate the matter outside the conference to determine whether the contention is true. If the teacher attempts to make assertions or arguments or to offer proof in areas other than a contention of an impermissibly based recommendation, the superintendent shall terminate the conference.

Within five days after the conference, the superintendent shall give a simple, unelaborated, written statement to the teacher as to whether he will recommend to the board that the teacher not be reappointed.

> **Comment:** As the comment to Section 3 stated, this conference is limited solely to a consideration of the teacher's contention that the recommendation not to reappoint was based on an impermissible reason. If the teacher's assertions go beyond this contention, the superintendent is required to terminate the conference.

Section 5. *Teacher's Request to Appear Before the Board.* If the teacher receives notice that the superintendent will recommend to the board that it not reappoint the teacher, he may, within five days after receiving such notice, request an opportunity *to make a statement* [for a hearing] on the superintendent's recommendation before *the board of education* [a specially designated hearing committee]. This request shall be granted only if the teacher contends that the superintendent's recommendation not to reappoint was based on one of the grounds stated to be impermissible in Section 1.

If the superintendent has recommended reappointment but the board decides not to reappoint, the teacher, within five days after receiving the board's notice, may request an opportunity *to make a statement* [for a hearing] on the board's decision before the board of education. This request shall be granted only if the teacher contends that the board's decision not to reappoint was based on one of the grounds stated to be impermissible in Section 1.

The request to make a statement [for a hearing] shall be in writing and addressed to the board chairman. It shall specify the ground(s) on which it is contended that the recommendation or decision was impermissibly based and shall include a short and plain statement of the facts that the teacher believes support the contention.

Submission of such a request constitutes on the part of the teacher: (1) a representation that he can support his contention by factual proof, and (2) acknowledgment that the school may offer in rebuttal of his contention any relevant data within its possession.

Comment: This section provides alternative types of presentation that the board may permit the teacher. The preferred option is that the teacher be limited to making a statement before the board. If the board wants to pursue issues that arise from the statement, it may put questions to the teacher and otherwise investigate the issue, but it is not obligated to do more than hear the teacher's statement. The second option provides for a hearing on the superintendent's recommendation or the board's decision, as the case may be. The disadvantage with this option is that the nonreappointment hearing probably will become like a full-blown discharge hearing. School attorneys and superintendents report that nonreappointment hearings are very similar to the discharge hearing. As in a discharge hearing, the teacher parades before the board a group of witnesses who testify to his outstanding qualities. From a practical if not legal standpoint, the superintendent is put into the position of having to prove that the board has good reasons not to reappoint. The board may lawfully deny reappointment to a teacher for any reason as long as it is not one of the impermissible reasons; but even though it may have a policy of nonreappointment when its administrators think a better teacher can be employed, it becomes difficult for a school board, which is usually popularly elected, not to cave in at a board hearing and reappoint a mediocre teacher, particularly since there is no charge of incompetence against the teacher.

An argument for allowing a hearing and not limiting the teacher to only a statement is that the hearing is permitted only after the teacher has asserted that the superintendent's recommendation or board decision was based on an impermissible reason and the teacher can demonstrate in the petition that he probably can prove this claim. In this situation—when there is some reasonable possibility of wrongdoing—the board may want to accept the disadvantages of a full-blown hearing in order to get more facts.

The board may prefer that either a hearing committee or a hearing examiner receive the teacher's petition and hear the evidence with a final appeal to the board on the record. This approach is used by all the North Carolina senior institutions of higher education and by most major American universities. Most school systems and many postsecondary institutions, however, will be better served by having the board receive the teacher's petition and hear the assertions of a nonreappointment based on an impermissible reason. But if the hearing committee or examiner option is used, the word "committee" or "examiner" must be substituted for the word "board." Also, a new section must be added that provides for the committee (examiner) and for an appeal on the record, not de novo, to the board.

Section 6. ***Board Action on Teacher Request.*** The board of education shall consider the request and shall permit the teacher *to make a statement* [a hearing] before it if it determines (a) that the request contains a contention

that the decision was impermissibly based under Section 1, and (b) that the facts suggested, if established, might support the contention. If it determines that the request does not meet these conditions, it shall immediately consider the superintendent's recommendation and reach a decision on the reappointment. It shall notify the teacher and the superintendent of its decision to reject the petition and its decision on reappointment with a simple, unelaborated, written statement. This notice shall terminate the proceedings and finally confirm the decision on reappointment.

If the request is granted, a board *meeting to hear the teacher's statement* [hearing] shall be held within ten days after the board receives the request. The teacher shall be given at least five days' notice of the hearing.

Comment: As already noted, neither the Constitution nor most state statutes, including North Carolina law, require a board hearing on a decision not to reappoint. Thus the board may decide to adopt a policy that authorizes a conference with the superintendent without providing for the possibility of a statement or hearing before the board. I recommend, however, that the opportunity for either a statement or a hearing be provided if the conditions specified in this section are met. Although this section affords an opportunity to come before the board only when the teacher alleges that the superintendent's recommendation or board's decision was impermissibly based and submits a statement of facts supporting that contention, it still gives the board an opportunity to reverse a wrong decision. Moreover, even if the board concludes that the superintendent's recommendation or its original decision was correct, its deliberative process undercuts an allegation that it acted arbitrarily.

But this section rejects an automatic appeal on a nonreappointment—for several reasons. It is important that the board not be obliged to hear the teacher's arguments that he is good enough for reappointment or is as good as or better than another teacher who was reappointed or another who has tenure. A board that permits a teacher to make these arguments to it will find it more difficult to stand by a judgment, which judgment is usually subjective, that this person does not have the potential to become an excellent teacher. A hearing at which the board is required to compare this teacher's performance with that of a tenured teacher will put the board on the defensive and frequently cause the board to back down on the nonreappointment when it should not. The teacher may correctly assert that he is better than the average tenured teacher or a particular tenured teacher; but that is irrelevant. The board can and should try to improve the quality of its teaching and administrative staff. It can and should strive to secure new teachers who are better or have the potential of being better than those already tenured.

Another bad consequence of giving teachers a right to a hearing on all nonreappointments is that almost inevitably the school will lower its

high standards for retention in order to avoid having to justify each nonreappointment decision at a hearing. The board will relinquish part of its discretion to make subjective judgments about and retain only those who have the potential to be excellent teachers.

The comment to Section 5 on the type of appearance the teacher is allowed to make before the board noted another bad consequence of an automatic hearing on recommendations or decisions not to reappoint: The superintendent or board usually feels compelled to list the reasons for its decision. The hearing then becomes very similar to a discharge, because the superintendent or board finds it necessary to prove that it did not act for impermissible reasons. In my judgment it is better to prohibit all board hearings on nonreappointment than to give a nonreappointed teacher an automatic right to a hearing before the board.

Sections 7 and 8 are to be used if the board procedure provides for a hearing rather than a statement by the teacher.

Section 7. *Conduct of the Hearing.* The hearing shall be conducted informally and in private with only the members of the board, the teacher, the teacher's principal, the superintendent, and such witnesses as may be called in attendance;[8] except that the teacher and the superintendent may each be accompanied or, in his absence, represented by a person designated in writing to act for him. A quorum for purposes of the hearing is a simple majority of the total board membership. Board members who will testify as witnesses or have any other significant conflict of interest are disqualified.[9] On request of the teacher and with the board chairman's approval, a transcript of the proceedings shall be provided to the teacher. The board may consider only such evidence as is presented at the hearing and need consider only such evidence as it considers fair and reliable. All witnesses may be questioned by the board members, the teacher, [and] the superintendent, [, and the representative of the teacher or the superintendent], [if either is absent.] Except as herein provided, the conduct of the hearing is under the board chairman's control.

Comment: The right of the teacher's and superintendent's representative to question witnesses is made optional. My preference is to permit it.

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8. The Fourth Circuit upheld the right of a board to require this hearing to be closed. It said in Satterfield v. Edenton-Chowan, 530 F.2d 567 (4th Cir. 1975), that a private hearing was as much for the protection of the teacher as for the school. A few states, like Florida, require these hearings to be open, but most states make an exception for personnel hearings.

9. A board is considered to be an impartial body even though it has earlier approved the superintendent's recommendation not to renew the contract. Also, objections that a board member is not impartial must be raised "at the earliest moment after knowledge of the facts." Satterfield v. Edenton-Chowan, 530 F.2d 567 (4th Cir. 1975).

Section 8. *Hearing Procedure.* The hearing shall begin with the teacher's presentation of contentions, limited to those grounds specified in the request for a hearing and supported by such proof as he desires to offer. When he has concluded his presentation, the board shall recess to consider whether the proof offered in support of the contention establishes the contention unless it is rebutted or unless the decision not to reappoint is now otherwise explained. If it determines that the contention has not been so established, it shall so notify the teacher and the superintendent with a simple, unelaborated, written statement that the teacher has not shown that the superintendent's recommendation or board decision not to reappoint was based on an impermissible reason. This notice shall be accompanied by the board's decision on reappointment when the hearing has considered the superintendent's negative recommendation. This notice shall terminate the proceedings and shall be the final decision on reappointment.

If the board determines that rebuttal or explanation by the superintendent is desirable, it shall so notify the parties and the hearing shall proceed. The superintendent may then present in rebuttal of the faculty member's contentions, or in general support of the decision not to reappoint, such testimonial or documentary proofs as he desires to offer, including his own testimony.

If the superintendent recommended reappointment but the board decided not to reappoint, the board shall designate someone to rebut the teacher's contentions. If the board attorney is chosen to make this rebuttal, he shall not serve as legal adviser to the board on any issue arising out of this nonreappointment.

At the end of the presentations, the board shall consider the matter in an executive session at which the superintendent shall not be present. The burden shall be on the teacher to satisfy the board that his contention is true.

Section 9. *Procedure After the Hearing.* After all the evidence has been presented, if the board determines that the teacher's contention has not been established, it shall, by a simple unelaborated statement, so notify him and the superintendent. This notice shall also include the board's decision on reappointment when the hearing has considered the superintendent's negative recommendation, which decision shall be final. If the board determines that the teacher's contention has been satisfactorily established, it shall so notify him and the superintendent by a written notice. This notice shall also include the board's decision on reappointment, which decision shall be final.

Code II

Grounds for Dismissal of Teacher

All but five states define or list the grounds for the dismissal of public school teachers in their statutes or the regulations of the state board of education.[10] Causes for discharge common to most state statutes include incompetence, neglect of duty, insubordination, noncompliance with school laws, immorality, and conviction of specified crimes. Some states, however, specify only a general dismissal standard like "good and just cause." Boards in these states need to elaborate in their board policy on teacher dismissal what grounds are included within such a vague phrase in order to give notice that will be adequate to meet constitutional requirements of the types of conduct or failures of performance that are grounds for discharge. And in states where the statutes list the grounds, the board may be authorized to add others or to define what is meant in statutorily listed grounds, such as neglect of duty, immorality, and inadequate performances. The following code is the type of dismissal policy that boards should adopt. Although this code is based on the North Carolina Tenure Act, boards in other states, after checking and conforming it to their state statutes, should adopt a similar statement as part of their own personnel policy on teacher dismissal.

Section 1. *Statutory Basis for Dismissal or Demotion.* A tenured teacher or a probationary or other nontenured teacher during the *school year* [contract period] may, in accordance with G.S. 115C-325(e)(1), be dismissed, demoted, or reduced to a part-time basis for one of the following reasons:
(a) Inadequate performance;

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10. S. Neill & J. Custis, Staff Dismissal: Problems and Solutions 8 (Sacramento, Cal.: Educational News Service for American Ass'n of School Administrators, 1978).

(b) Immorality;[11]
(c) Insubordination;[12]
(d) Neglect of duty;[13]
(e) Physical or mental incapacity;
(f) Habitual and excessive use of alcoholic beverages or nonmedical use of a controlled substance as defined in General Statutes Chapter 90, Article 5;
(g) Conviction of a felony or a crime involving moral turpitude;[14]
(h) Advocating the overthrow of the Government of the United States or the State of North Carolina by force, violence, or other unlawful means;
(i) Failure to fulfill the duties and responsibilities imposed on teachers by the North Carolina General Statutes;

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11. A teacher who characterized a female student as a whore is not guilty of immorality. *See* Thompson v. Wake County Bd. of Educ., 31 N.C. App. 401 (1976), *rev'd on other grounds*, 292 N.C. 406 (1977). For a general discussion of what constitutes immorality, see Chapter 8, *Teachers*, in R. Phay, School Law: Cases and Materials (Chapel Hill, N.C.: Institute of Government, 1980).

12. "Insubordination imparts a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders"; Thompson v. Wake County Bd. of Educ., 31 N.C. App. 401, 424-25 (1976). The court also noted that a local board need not tell its teachers in advance of all possible types of misconduct before it can find a teacher guilty of insubordination. "[R]epeated acts of teacher misconduct which are obviously contrary to accepted standards of behavior in the teaching profession and the community in general should constitute insubordinate conduct."

13. Maintaining discipline and encouraging morality are part of a teacher's duties. The Fourth Circuit upheld a board finding of neglect of duty when a tenured teacher intercepted a note that was circulating among her students and read it to the class. The note contained three vulgar colloquialisms that the teacher emphasized while reading it to that class and another class. *See* Frison v. Franklin County Bd. of Educ., 596 F.2d 1192 (4th Cir. 1979).

14. The phrase "crime involving moral turpitude" is not defined by the tenure statute. In a 1975 Institute of Government memorandum, Michael Crowell reported that the most common definition is "[a]n act of baseness, vileness or depravity in the private and social duties that a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man." The most frequent use of the phrase is as a standard in denying entry to or deporting aliens. In state law, the phrase is most often used as a standard in revoking licensure of professionals and for determining whether a crime is one about which a witness may be questioned.

For purposes of the immigration law, the lower federal courts have consistently held the following crimes to involve moral turpitude: bribery, child-beating, embezzlement, forgery, fraud, larceny, perjury, armed robbery, rape, smuggling, and tax offenses. The following crimes are fairly consistently held not to involve moral turpitude: adultery, drug offenses, fornication, carrying concealed weapon, giving false statements. Decisions have gone both ways, depending on the circumstances of the crime in regard to the following offenses: assault, bigamy, burglary, counterfeiting, disorderly conduct, homicide, liquor offenses, and manslaughter. Crowell also reports that the list of crimes involving moral turpitude applies to both misdemeanors and felonies and cuts across other categories of criminal offenses. Clearly, the phrase is ambiguous, and a superintendent should be cautious before initiating a discharge for a misdemeanor he considers to involve moral turpitude. (All felony convictions are grounds for dismissal.) He should not send the notice of intention to discharge until he has discussed the discharge with the board attorney. *See* Memorandum of Michael Crowell, dated December 23, 1975, in the Institute of Government library, Chapel Hill, N.C.

(j) Failure to comply with such reasonable requirements as the board may prescribe;[15]

(k) Any cause that constitutes grounds for revoking a career teacher's teaching certificate;

(l) A justifiable decrease in the number of positions as a result of district reorganization or lower enrollment or decreased funding;[16]

(m) Failure to maintain one's certificate in a current status; or

(n) Failure to repay money owed to the state in accordance with the provisions of Article 60, Chapter 143 of the North Carolina General Statutes.

Comment: G.S. 115C-325(e)(1) sets out the grounds for dismissing, demoting, or reducing to a part-time basis a tenured teacher at any time or a probationary teacher during the contract period. Section 1 restates the North Carolina statutory grounds for dismissal and demotion.

Interpreted literally, the North Carolina tenure act's grounds for dismissal or demotion applies only to school employees who come within the definition of a teacher. Only teachers who hold "at least a current, not expired, 'Class A certificate' or a regular, not provisional or expired, vocational certificate . . ." are included. This section adds "or other nontenured teacher" to the rule in order to make the rule apply to all teachers in the school board's employ.

Because most statutes use the term "school year" when describing the probationary teacher's procedural rights, this term has been used here; the term "contract period" is more precise and may be substituted.

Statutory duties of teachers and principals. G.S. 115C-325(e)(1)(i) authorizes dismissal for "[f]ailure to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of this State." It is necessary, therefore, to know what duties the statutes specify for teachers. They include the following:

—Maintain good order and discipline (G.S. 115C-307).

—Encourage temperance, morality, industry, and neatness (G.S. 115C-307).

—Promote the health of all pupils, especially children in the first three grades, by providing frequent periods of recreation, supervise play activities during recess, and encourage wholesome exercises (G.S. 115C-307).

—Teach as thoroughly as the teacher is able all branches required to be taught (G.S. 115C-307).

—Provide for singing in the school and, if possible, give instruction in music (G.S. 115C-307).

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15. Several teacher dismissals have been based on failure of the teacher to follow school policy on the administration of corporal punishment. *See, e.g.*, Kurtz v. Winston-Salem/Forsyth Bd. of Educ., 39 N.C. App. 412 (1979).

16. See Code IV for a reduction-in-force procedure.

—Cooperate with the principal in determining the cause of pupil nonattendance (G.S. 115C-307).
—Make reports required by the board of education [G.S. 115C-307(g)].
—Make reports to the principal required by the superintendent [G.S. 115C-288(b)].
—Instruct students in the proper care of public property; exercise due care in protecting school property against defacement of the walls and doors or by breakage (G.S. 115C-523).
—Screen and observe all pupils in health education programs in order to report deviations from normal conduct [G.S. 115C-81(d)].

The statutes also specify *special duties for principals* that include the following:

—Give suggestions to teachers for improvement of instruction [G.S. 115C-288(c)].
—Make reports required by the superintendent and board of education [G.S. 115C-288(b)].
—Instruct students in the proper care of public property; exercise due care in protecting school property against defacement of the walls and doors or by breakage (G.S. 115C-523).
—Report unsanitary conditions, damage to school property, or needed property repair to the superintendent (G.S. 115C-523).
—Conduct a fire drill in each building in which children assemble during the first week of school and at least once each school month thereafter [G.S. 115C-288(d)].
—Inspect each building in his charge at least twice a month during the regular school session [G.S. 115C-288(d)].
—File a written report on fire drills once a month during the regular school session [G.S. 115C-288(d)].
—Remove all fire hazards and keep corridors and exits clear [G.S. 115C-525(a)].
—Assign pupils and employees entitled to school transportation to buses so that they are transported in an orderly, safe, and efficient manner (G.S. 115C-244).
—After a child has five consecutive or ten accumulated absences, notify his parent; and after thirty accumulated absences, notify the prosecutor (G.S. 115C-378).
—Assign drivers to school buses (G.S. 115C-245).
—Submit bus route plans to the superintendent (G.S. 115C-246).
—Report to superintendent all bus defects reported by drivers (G.S. 115C-248).
—Discontinue any buses found to be defective (G.S. 115C-248).
—Screen and observe all pupils in health education programs in order to detect and report deviations from normal conduct [G.S. 115C-81(d)].

Section 2. ***Additional Local School Board Grounds for Dismissal or Demotion.*** As authorized by G.S. 115C- 325(e)(1)(j), a tenured teacher or a probationary teacher during the school year may be dismissed, demoted, or reduced to a part-time basis for one of the following reasons:

(a) . . . .

(b) . . . .

Comment: The use of Section 2 is optional. G.S. 115C-325(e)(1)(j) permits the school board to dismiss or demote teachers who fail to comply with reasonable requirements prescribed by the local board—for example, failure to follow board policy on administering corporal punishment or assaulting school personnel. Although such a regulation might be covered by one of the reasons set out in G.S. 115C-325(e)(1) (see Section 1), the school board may wish to be more specific than the statute. It also may want to define such vague statutory terms as inadequate performance and immorality. If the board chooses to adopt such additional requirements, it should do so in this code so that the requirements are widely publicized and clearly understood.

Code III

Teacher Dismissal Procedure

Most states' statutes on public schools set out a mandatory procedure for dismissing teachers. These procedures usually are found in the states' tenure acts. Some acts prescribe the procedure in considerable detail, as North Carolina's elaborate law does, while others simply provide that the teacher may be dismissed after notice and an opportunity for a hearing on the charge have been given. In either case, the school board needs to adopt a board policy that sets out the statutory requirements and adds to it the procedures for resolving the many issues not addressed by even the most detailed statutory discharge procedure. For example, few statutes define the standard of proof, state who goes forward with the evidence and at what time, provide for removal of a board member with a conflict of interest, and spell out the role of the school attorney. These issues and many others need to be resolved in the board policy. The following model dismissal procedure resolves them in the context of the North Carolina teacher dismissal statute. Boards in other states that are attempting to draft their own procedure can use this model as a general framework and checklist. They will of course have to modify this procedure where it is not consistent with their state's statutes, state board of education policies, or collective bargaining contracts. Moreover, the non-North Carolina user will need to eliminate the out-of-district review panel unless his statute has a similar requirement. This panel and several other procedures mandated by the North Carolina dismissal act are not recommended to non-North Carolina boards. Thus though this procedure is the one I recommend that North Carolina school boards adopt, it is flawed by several statutory imperatives that establish bad policy in the discharge procedure.

Dismissal Procedure

Section 1. *Coverage.* This procedure shall be used in

(a) Dismissing,[17] demoting, or reducing to a part-time basis the employment of a tenured teacher without the teacher's consent;

(b) Discharging a probationary [or other nontenured] teacher during the *school year* [period for which he has been employed] without his consent.

Comment: This code sets out a procedure consistent with the North Carolina Tenure Act (G.S. 115C-325) for dismissing or demoting a tenured teacher and discharging a probationary teacher during the contract period of employment. The word teacher is defined in G.S. 115C-325(a)(9) to include principals, most supervisors, librarians, school psychologists, and other certified school personnel who are either classified or paid as a classroom teacher. Superintendents, including assistant and associate superintendents, are excluded. Also excluded are teachers who do not hold "at least a 'Class A Certificate' as provided by G.S. 115C-284(c) or any other regular vocational or rehabilitation teaching certificate." If the board wants this procedure to apply to teachers who do not have at least a Class A certificate, it can make it do so by adding the words "or other nontenured" as set out in the brackets in subsection (b), above. The procedure would still not apply to noncertified school employees, such as cafeteria workers, janitors, and secretaries.

Section 2. *Local Superintendent's Investigation.* The [name of local school unit] superintendent has the initial responsibility in the dismissal procedure. When allegations that constitute a basis for dismissing a teacher are made by a principal or other person, the superintendent shall investigate them and review all available information before deciding to recommend dismissal. If he thinks it justified, he shall interview the teacher and permit him to raise any defense that he thinks relevant. Before beginning the interview, the superintendent shall tell the teacher the purpose of the interview and the charges against him. If the teacher requests that other witnesses be questioned, the superintendent shall interview them if possible.

Comment: The superintendent's investigation is intended to be informal and to give him a basis for reaching a preliminary determination as to the validity of the charges and whether dismissal or demotion is the appropriate action. This interview is not required by the statute.

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17. For simplicity, the words dismissing, dismissal, and dismiss will hereinafter include dismissal, demotion, and reduction to a part-time basis.

Section 3. *Suspension with Pay.* If the superintendent thinks that there is cause for dismissing or demoting a teacher on any ground specified in paragraphs (b) through (h) in Section 1 of Code II but also believes that additional investigation is necessary and circumstances are such that the teacher should be removed immediately from his duties, he may suspend the teacher with pay for a reasonable period. The period may not exceed ninety days. The superintendent must notify the board immediately of his action, and if dismissal or demotion proceedings are not begun against the teacher within ninety days, the teacher shall be reinstated to his duties; at his request, all record of the suspension shall be removed from his file.

> **Comment:** Suspension with pay was added to the North Carolina teacher tenure statute in 1981 by G.S. 115C-325(f1). This authorization eliminated an ambiguity in the statute that has authorized only a suspension without pay, thereby creating a question about the right to remove with pay.

Section 4. *Suspension Without Pay Pending Dismissal*

(a) *Misconduct procedure.* If the local superintendent determines that there is cause for dismissing a teacher on any ground specified in paragraphs (b) through (h)[18] in Section 1 of Code II and that the immediate suspension of the teacher is in the best interest of the school system, he may ask the board to suspend the teacher immediately and without pay. The board, on the superintendent's recommendation or entirely on its own motion, may suspend the teacher without pay if it believes that cause exists for dismissal on any ground specified in Section 1(b) through (h) of Code II and that the suspension is necessary. The suspension must be by board resolution, and the teacher need not be given notice or a hearing before being suspended.

(b) *Inadequate-performance procedure.* If the local superintendent thinks that a teacher's performance is so poor that it constitutes an emergency requiring the teacher's immediate removal from his duties, he may ask the board to suspend the teacher immediately and without pay. If the board agrees with the superintendent's recommendation or concludes itself that the teacher's performance is so poor that an emergency exists that requires immediate removal, it shall send the teacher written notice stating that it plans to suspend him and giving the reasons for this planned action. Not less than two nor more than five days after the teacher receives the board's notice, the board shall hold a hearing on whether it should suspend the teacher. The hearing procedures provided in G.S. 115C-325(j) shall be followed, and the

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18. The statute reads "b to h." In my opinion, the North Carolina legislature intended to permit suspension without pay for the grounds specified in paragraphs b through h, inclusive, of G.S. 115C-325(e).

superintendent shall make available to the board all teacher evaluations and other information in the teacher's personnel file. If the board finds it necessary to suspend the teacher, it may by resolution suspend him without pay.

(c) *General.* When a teacher is to be suspended, the superintendent need not conduct the investigation described in Section 2. However, within five days after the suspension, he must initiate dismissal or demotion procedures in accordance with this code. If dismissal procedures are not begun within this time, the board shall reinstate the teacher and pay him for the period of suspension. If it is ultimately determined that grounds did not exist for dismissing or demoting the teacher, in accordance with G.S. 115C-325(f) the teacher shall be immediately reinstated to his position and paid for the period of suspension.

Comment: Immediate suspension without pay is intended to cover those situations in which the continued presence of the teacher will cause or is very likely to cause substantial damage to the educational processes. The suspension authorized by this section is based on G.S. 115C-325(f), which provides two suspension procedures; which one is used depends on the grounds. If the reason for suspension is that the teacher has committed one of the seven reasons listed in Section 1(b) through (h) of Code II—which include such things as immorality, conviction of a felony, or physical or mental incapacity—the school board may immediately suspend the teacher if it finds the suspension to be "necessary." But if the reason for suspension is inadequate performance, the burden on the board before it suspends is much greater. If the board contemplates removal for inadequate performance, it must give the teacher written notice of its intention and the reasons for the planned action. A hearing must then be held at which the board must find that the "teacher's performance is so poor that an emergency situation exists." Suspension is made more difficult for this reason because inadequate performance does not suddenly begin; rather, it probably has existed for some time and may be correctable. If the performance does not improve, the board may discharge the teacher. Only when the performance creates an emergency is the board allowed to suspend without pay.

Section 5. *Suspension Without Pay Followed by Reinstatement.* If the superintendent thinks that any of the grounds specified in Section 1 of Code II exist but suspension without pay for thirty days is the appropriate penalty, he may seek the suspension by following the same procedure set out for dismissal as is described below. If the board finds that cause has been proved, it can order the teacher suspended without pay for thirty days.

Comment. The authorization of this third procedure for suspension without pay was accomplished by amending G.S. 115C-325(a) (4) to redefine the word "demote." The effect of this amendment is to authorize the superintendent to initiate a suspension-without-pay procedure under the regular procedures of the Tenure Act. Rather than take the issue to the school board for immediate action, as G.S. 115C-325(f) requires, the superintendent must begin the same drawn-out process that the act requires for a discharge: written notice of intent to suspend without pay, notice sent by certified mail, teacher given fifteen work days to request a review by a panel of the Professional Review Committee, etc. The school year could be out before the board finally acted on the superintendent's recommendation. Although the grounds for seeking a suspension without pay are not restricted under this new authorization as they are in G.S. 115C-325(f), the time and effort required to impose the penalty probably will result in infrequent use of it. If the superintendent thinks it is worthwhile to go through the Tenure Act's discharge procedure, he probably will be seeking discharge or a more permanent pay reduction rather than a suspension without pay for a maximum of thirty days.

Section 6. *Superintendent's Notice to Teacher of Recommendation to Dismiss.* If the superintendent, after investigating, decides that dismissal is justified, he shall notify the teacher by certified mail that he intends to recommend dismissal. This notice shall include:

(a) A list of the grounds upon which dismissal is to be recommended to the school board.

(b) A summary of the evidence and the names and positions of the accusers.

(c) An explanation of the teacher's alternatives, which are:

(1) The teacher may, within 15 days after receiving the notice, submit to the superintendent a written request that the recommendation be reviewed by a five-member panel of the Professional Review Committee before the local school system takes any further action. In the request for a panel review, the teacher has the right to reject up to 30 of the Professional Review Committee as unacceptable for his panel. He also has the right to require that at least two panel members "be members of his professional peer group."

(2) The teacher may, within 15 days after receiving the notice, submit to the superintendent a written request that the panel not be used and that he receive an immediate hearing before the board on the superintendent's recommendation.

(3) The teacher may do nothing. If he does not request a panel review or school board hearing within 15 days after receiving the

superintendent's recommendation, the superintendent may file his recommendation with the school board, which may act on the recommendation without a hearing.

(d) A copy of the Tenure Act (G.S. 115C-325).

(e) A copy of this code.

(f) A current list of Professional Review Committee members.

Comment: G.S. 115C-325(h)(2) requires that the superintendent give the teacher written notice by certified mail of his intention to recommend dismissal or demotion and the grounds and evidence upon which he makes the recommendation. This notice allows the teacher to make an informed decision on whether to request a review and to prepare a defense. Even if the statute did not so provide, constitutional due process standards of adequate notice entitle the teacher to full knowledge of the offense charged, the basis of the charge, the nature of the hearing, and the opportunities for defense.[19]

The State Superintendent of Public Instruction, with the State Board of Education's consent, appoints the panel members from the Professional Review Committee. This committee consists of 121 members, eleven from each congressional district. Five of the eleven must be lay persons, and six must have taught or supervised the public schools for the past five years [G.S. 115C-325(g)]. The State Superintendent will furnish local superintendents with the committee list that is to be included in the notice.

The teacher's rights to reject up to 30 members of the Professional Review Committee from consideration for membership on his review panel and to have at least two panel members from his professional peer group are granted by G.S. 115C-325(i)(1) and G.S. 115C-325(h)(4), respectively.

Form 2 in the Appendix is a suggested notice form.

Section 7. *Panel Review Waived.* (a) If the teacher does not respond within 15 days after receiving the notice provided in Section 4, it shall be presumed that he has waived his right to both a panel review and a board hearing, and the superintendent may forward his recommendation, together with the evidence on which such recommendation was made, to the board—but not until 15 days after notice was given to the teacher. After receiving the superintendent's notice, the board may by resolution dismiss the teacher or reject the superintendent's recommendation and reinstate the teacher if he has been suspended.

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19. *See, e.g.*, Lucas v. Chapman, 430 F.2d 945 (5th Cir. 1970).

(b) The teacher may waive the panel review and request an immediate hearing before the board of education. This waiver and request must be made within 15 days after he receives the superintendent's notice and must be in writing. If a board hearing is requested, the school board shall schedule it within 10 days after it receives the teacher's request for a hearing.

Comment: G.S. 115C(h)(3) permits the teacher to request either a panel review or an immediate board hearing. If neither request is made, the superintendent may file his recommendation with the board, which may then discharge the teacher without a hearing.

The requirement that the superintendent wait 15 days after giving notice to the teacher before submitting his recommendation to the board is in accordance with G.S. 115C-325(h)(2).

Section 8. *Panel Review Requested.* If the teacher requests a panel review, the local superintendent, within five days after he receives the request, shall ask the Superintendent of Public Instruction to designate a review panel. If the teacher has designated members of the Professional Review Committee (up to 30) as unacceptable for his panel or has demanded that at least two panel members be from his professional peer group, the local superintendent shall list the designated Review Committee members in his request. The local superintendent may also include in the request the names of up to 30 Committee members whom he deems to be unacceptable for the review panel.

Comment: Within five days after he receives a request for panel review, the local superintendent must ask the Superintendent of Public Instruction to appoint the panel [G.S. 115C-325(h)(4)]. Until the panel review is completed, the local board of education can neither receive the superintendent's recommendation nor take any action except suspension as set out in Section 4 of this code.

G.S. 115C-325(i)(1) allows the local superintendent and the teacher to designate up to 30 Professional Review Panel members each as unacceptable for appointment to the review panel. G.S. 115C-325(h)(4) allows the teacher to require that two of the panel members be from his professional peer group.

The Superintendent of Public Instruction is responsible for designating the hearing panel within seven days after receiving the local superintendent's request. G.S. 115C-325(h)(4) provides that two of the members he designates must be lay persons and none may be employed in or be residents of the county where the request is made. (See the comment to Section 6 of this code for the composition and appointment of the Professional Review Board.)

Section 9. *Hearing Before the Review Panel.* [The procedures for the hearing before the review panel are set out in the tenure statute—G.S. 115C-325(j) and (k).]

> **Comment:** G.S. 115C-325(j) permits the review panel to conduct such investigation as it considers necessary to determine the validity of the superintendent's recommendation. The panel's procedures are also set out in the statute. They give the superintendent and the teacher the right to appear with counsel, to present any pertinent evidence, and to cross-examine witnesses. The panel is to be given whatever help it needs to conduct its investigation, but the statute does not specify who provides the assistance. Presumably the local school system must do so, including providing a place to meet, access to school records relevant to the inquiry,[20] and modest secretarial services.

Section 10. *Panel Report.* [The North Carolina tenure statute requires a panel report.]

> **Comment:** G.S. 115C-325(i)(4) requires the panel to complete its investigation and submit a written report to the superintendent within 20 days after its appointment. (The panel's life may be extended for ten days.) The panel's report must outline the scope of its investigation and its findings on whether the grounds for the superintendent's recommendation are true and substantiated. It is not required that the teacher be given a copy at this time.

Section 11. *Superintendent's Recommendation.* After receiving the panel report, the superintendent may either recommend dismissal to the board or drop the charges. If he does not recommend dismissal within five days after he receives the panel report, the charges are automatically dropped. If the superintendent recommends dismissal to the board, he shall submit to them the grounds for his recommendation and include a copy of the panel's report. A copy of his recommendation shall be sent to the teacher at the same time that the recommendation is sent to the board.

> **Comment:** The panel report does not bind the superintendent. He may recommend dismissal even though the panel found the charges unsubstantiated. The five-day time requirement is set by G.S. 115C-325(i)(5).

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20. The Buckley Amendment (Family Educational Rights and Privacy Act of 1974) may prohibit the release of student records. *See* Brannon, *Student Records and Privacy: Proposed School Board Regulations*, 8 SCHOOL LAW BULL. 1 (January 1977). Teacher records, other than those of the teacher involved, also may not be available under board policy adopted pursuant to G.S. 115C-325(b).

Section 12. *Board of Education's Notice to the Teacher of Its Recommendation to Dismiss.* Within seven days after the board receives the superintendent's recommendation and before it takes any formal action, its chairman shall notify the teacher by certified mail of the superintendent's recommendation. This notice shall contain:

(a) A copy of the superintendent's recommendation;
(b) A copy of the panel report;
(c) A statement that the teacher has a right to a hearing before the board, if he requests it within five days after he receives this notice; and
(d) A tentative date, time, and place for a hearing, if the teacher requests one.

Comment: The notice provisions of the section are required by G.S. 115C-325(i)(6). It prohibits the board of education from taking any immediate action on the superintendent's recommendation and requires it to give the teacher a copy of the superintendent's recommendation and the review panel's report within seven days after the superintendent submits his recommendation. The teacher has five days to notify the board whether he wants a hearing.

Form 3 in the Appendix is a proposed notice form.

Section 13. *Board Hearing Waived.* If the teacher does not respond within five days after receiving the notice provided for in Section 12, it shall be presumed that he has waived his right to a hearing before the board of education. The board shall then consider the recommendation and may by resolution dismiss or reinstate the teacher.

Comment: G.S. 115C-325(i)(6) provides that the teacher who wishes a hearing before the board must request it within five days after he receives the board's notice. If no request is made, the board may act on the superintendent's recommendation without a hearing.

The teacher may not litigate the issue until after the board has acted. The North Carolina Court of Appeals rejected an attempt to enjoin the board from acting on the superintendent's recommendation on a finding that the teacher must exhaust the statutory procedure before bringing suit.[21]

Section 14. *Board Hearing Requested.* If the teacher requests a hearing, the board shall schedule it at the earliest possible date, but not sooner than seven days nor later than 20 days after the teacher receives the board's notice. However, if both the teacher and the superintendent desire an earlier hearing date and can agree to it in writing, the board may set an earlier time.

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21. Church v. Madison County Bd. of Educ., 31 N.C. App. 641, 230 S.E.2d 769 (1976).

The teacher and the superintendent may both request a delay, which the board should grant for sufficient cause.

> **Comment:** If the teacher notifies the board that he wants a hearing, G.S. 115C-325(i)(6) requires it to set the time and place for the hearing. If both the teacher and the superintendent wish not to wait seven days to begin the hearing and can agree to an earlier hearing date, the statute probably will not be violated if the hearing is held earlier. To protect itself, however, the board should require the teacher and the superintendent to sign a statement that they prefer an earlier hearing time.

Section 15. *Composition of the Hearing Board*

(a) *The Hearing Board.* The [name of the local school unit] Board of Education shall act as the hearing board. A quorum consists of a majority of the total membership. A board member who will testify as a witness or has any other conflict of interest shall disqualify himself or be excused by the board's adoption of a motion to disqualify him.[22]

> **Comment:** The superintendent is the ex officio secretary of the board and is not considered to be a board member.
>
> A question may arise whether a panel of two board members may be used to conduct the hearing. G.S. 115C-45(c) permits such panels in appeals from "the decision of all school personnel." Although "decision" is a broad term, it is my opinion that the word as used in the statute means an action that has changed the teacher's status. Since no such action has been taken at this point in the dismissal procedure, in my view the board may not use a panel in place of the entire board. Moreover, the Tenure Act speaks only in terms of the board and makes no mention of panels. It would be unwise, therefore, to jeopardize the board decision by using a panel.

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22. *See* Baxter v. Poe, 42 N.C. App. 404 (1979), in which a tenured teacher in a dismissal hearing argued that the school board was not an impartial hearer, pointing out that one board member testified in superior court that before the board hearing, she (the board member) knew that the superintendent's recommendation of discharge was based on the teacher's physical abuse of her students. The court rejected the teacher's argument, saying that board members have a statutory duty to keep themselves informed of such situations. It noted, "[M]ere familiarity with the facts of a case gained by an agency in the performance of its statutory duties does not disqualify it as a decision-maker," quoting Thompson v. Board, 31 N.C. App. 401, 412, 230 S.E.2d 164, 170 (1976), *rev'd on other grounds*, 292 N.C. 406, 233 S.E.2d 583 (1977).

In an earlier decision the same court rejected a teacher's assertion that board participation in an initial decision to suspend without pay destroyed the board's impartiality at the later hearing on permanent discharge. Thompson v. Wake County Bd. of Educ., 31 N.C. App. 401 (1976), *rev'd on other grounds*, 292 N.C. 406 (1977). The court said that the board finding that cause exists for immediate suspension is a different function from the formal hearing on discharge in which the board first reaches the merits of the case. *Accord*, Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976).

(b) *The Presiding Officer.* The chairman of the board of education, or another board member designated by the chairman, shall be the presiding officer.

The presiding officer shall have the following duties and powers:

(1) He schedules the hearing at a specified date, time, and place. He has authority to postpone the date and time or change the place for good cause.

(2) He assures the presence of a quorum at the meeting.

(3) He is available before the hearing to answer any questions that the teacher or his representative may have about the nature and conduct of the hearing.

(4) He has full charge of the hearing and has authority to direct its proceedings and to control the conduct of all persons present, subject to the general directions of this procedural code. He may limit questioning that is unproductively long or irrelevant.

(5) He writes the board's findings of fact and decision. He may delegate this responsibility to another board member.

Comment: The board needs an executive to make arrangements of time and place and assure the proper notification of all participants. Some one person must be in charge of the hearing, have the authority to say "who can do what," and maintain order at the hearing. These duties and decisions have been assigned to the chairman of the school board as the logical one to serve as presiding officer. The chairman should avoid relying on the superintendent to handle the hearing arrangements, since the superintendent performs the duties of a "prosecutor" in the dismissal procedure.

Section 16. *Hearing Procedure*

(a) *If the Teacher Requests an Immediate Hearing by the Board of Education.* The hearing shall begin with the superintendent's (or the school board attorney's, if preferred) presentation of the charges and the evidence to support those charges. The superintendent's witnesses shall be subject to cross-examination by the teacher. The teacher may then present any evidence to refute or explain the charges and evidence already introduced. The teacher's witnesses shall also be subject to cross-examination. If the board wants other witnesses, it may call them on its own authority. (See Section 19.)

(b) *If the Review Panel Finds That the Grounds for the Superintendent's Recommendation Are True and Substantiated.* If the review panel has found that the superintendent's charges are true and substantiated and a hearing is to be held, the hearing shall begin with the superintendent (or the school board attorney, if preferred), who shall present his recommendation to the board, review the panel report and the evidence considered by the review

panel, and present additional evidence, if any, bearing on his recommendation. The teacher may then present any evidence bearing on the charges and testify on the charges or any evidence already introduced. If either the superintendent or the teacher presents evidence not presented to the review panel, the other shall be allowed to rebut or explain the newly introduced evidence.

All witnesses shall be subject to cross-examination.

The report of the panel, which was submitted to the board earlier, shall be deemed competent evidence.

Comment: The Tenure Act provides for two types of board hearings following the review panel's report. If the review panel finds that the evidence substantiates the grounds on which the superintendent's recommendations are based, the hearing may be informal; according to the statute, G.S. 115C-325(k), the board is to consider only the panel report, the superintendent's recommendation, and any evidence presented by the teacher.

Section 16(b) of this code is based on G.S. 115C-325(k). However, the code section specifically grants the superintendent the right to introduce evidence not in the panel's report and the right to cross-examine witnesses presented by the teacher. The statute says nothing about the superintendent's introducing additional evidence or cross-examining witnesses, but granting these hearing rights seems consistent with the Tenure Act. Furthermore, unless the superintendent may cross-examine witnesses, he may be hampered in challenging the validity of the witness's statements and in pointing out inconsistencies in the testimony. If he cannot introduce evidence outside the panel report, he is unfairly deprived of an opportunity to present newly discovered evidence or evidence presented to the panel but not included in its report.

(c) *If the Review Panel Does Not Find That Grounds for the Superintendent's Recommendation Are True and Substantiated.* If the review panel has found that the superintendent's charges are not true and substantiated and a hearing is to be held, the hearing shall begin with the superintendent (or the board attorney, if preferred), who shall present his recommendation to the board and introduce any evidence to substantiate it. The teacher may then present any evidence as to whether the grounds are substantiated and testify on the charges or any evidence already introduced. If either the superintendent or the teacher presents evidence not presented to the review panel, the other shall be allowed to refute or explain the newly introduced evidence.

All witnesses shall be subject to cross-examination.

The report of the panel, which was submitted to the board earlier, shall be deemed competent evidence.

Comment: If the review panel does not find the grounds for the superintendent's recommendation to be substantiated, a much more formal hearing procedure is contemplated [G.S. 115C-325(l).] Instead of a review of the recommendation and panel findings as in (b) above, a hearing de novo is held at which the superintendent presents his entire case to the board, followed by the presentation of the teacher's evidence. These differences are provided for by this code section. Other differences, such as the subpoena of witnesses, are set out in separate provisions.

Section 17. *Evidence.* Witnesses shall testify in person. However, if a necessary witness is not available but was available to the panel of the Professional Review Committee, his testimony before the panel, if subject at that time to cross-examination, may be considered by the school board.

The hearing board shall consider only such evidence as it deems to be fair and reliable.

Comment: Courts have uniformly ruled that school board hearings need not be conducted on the basis of the rules of evidence used in a court of law.[23] To do so, courts have said, would impose intolerable burdens on the school board. This section recognizes the difficulty of applying such rules and allows the board to determine what evidence should be considered and what weight to give it. (See Section 19 for the rule on questioning witnesses.)

Section 18. *The Teacher's Statement.* The teacher may testify in his own defense and may be questioned on his testimony. If he chooses not to testify, his refusal shall not be considered as evidence in determining the validity of the allegations, and he shall not be punished later for refusal to testify.

Comment: G.S. 115C-325(j)(3) guarantees the teacher the right to be present and to testify at the hearing.

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23. The North Carolina Administrative Procedure Act (APA), which requires state agencies to apply most of the standard rules of evidence in administrative hearings, does not apply to boards of education. *See* N.C. GEN STAT § 150A-2. The Attorney General also has ruled that the APA does not apply to community colleges and technical institutes. In Baxter v. Poe, 42 N.C. App. 404 (1979), a tenured teacher objected at a board hearing on discharge to the board's failure to follow formal rules of evidence, particularly in the use of what would be inadmissible hearsay under the state's rules of civil procedure. In rejecting this argument, the court said that the school board's hearing procedures are administrative, not judicial, and thus the board may conduct hearings under a more relaxed set of rules than a court of law. When hearsay evidence provides the "necessary background for understanding" the issue, it may be admitted and considered by the board in reaching its decision. *See also* Satterfield v. Edenton-Chowan, 530 F.2d 567 (4th Cir. 1975), in which the Fourth Circuit Court of Appeals upheld the admissibility of testimony given by school officials that was based on parents' complaints about a teacher. The court said that such testimony, even if hearsay, does not violate due process in an informal administrative hearing.

The Tenure Act says nothing about compulsory testimony. Although most cases have held that the Fifth Amendment is not applicable to teacher dismissal proceedings, as a matter of policy the board should not seek to prove the grounds of dismissal by compelling the teacher to incriminate himself.

Section 19. *Questioning Witnesses.* Members of the hearing board, the teacher and his representative, the superintendent, and the school board attorney may question all witnesses who testify before the board, including the superintendent and the teacher. Witnesses shall testify under oath or affirmation administered by a board member. The presiding officer may limit unproductively long or irrelevant questioning.

Comment: The school board may use any of several oaths in swearing witnesses, including the following one, adopted from G.S. 11-11:

Do you solemnly swear (or affirm) that the evidence you shall give to this hearing before the _____ Board of Education shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Section 20. *Subpoena of Witnesses*

(a) If a witness whom the hearing board requests to appear and testify at the hearing refuses to appear, the board may issue a subpoena to compel his presence.

(b) In a hearing in which the review panel does not find the grounds for the superintendent's recommendation to be true and substantiated, the board shall, at the request of either the superintendent or the teacher, subpoena any witness who resides within the state to appear at the hearing and testify. Subpoenas shall be issued "in blank" by the board over the signature of the chairman or secretary. If the witness neither resides within the county where the dismissal originated nor is an employee of the board, he shall be entitled to receive the same mileage and per diem as G.S. 7A-314 provides for witnesses. Witnesses who are employees of the board shall suffer no loss of compensation because they were subpoenaed to testify. The board shall pay the required expenses for witnesses subpoenaed except that it shall not be accountable for the witness fees of more than five witnesses subpoenaed on behalf of the teacher.

Comment: The school board has two statutory authorizations to subpoena witnesses. G.S. 115C-45(a) authorizes the board to issue subpoenas for witnesses "in any and all matters which may lawfully come within the powers of a board and which, in the discretion of the

board, requires investigation." This subpoena power may be used at the request of either the superintendent or the teacher.

The second authorization is in G.S. 115C-325(l)(3). It is available only when the review panel has found the superintendent's charges not to be substantiated by the evidence. This statutory provision is set out in subsection (b) above. Although the statute says that the board shall subpoena witnesses upon the request of the superintendent or teacher, good practice suggests that the witness's appearance should be requested before a subpoena is issued to compel his attendance at the hearing, unless the board already knows that the witness is reluctant to appear.

The term "in blank" refers to the procedure whereby the chairman signs the subpoena without entering the prospective witness's name. The name is entered later by the party that requests the subpoena.

Section 21. *Public Hearing*

(a) The hearing shall be private. It may be attended only by the members of the board of education, the superintendent, the school board attorney, the teacher, and the teacher's representative. However, the presiding officer may allow attendance by impartial observers or members of the teacher's family if requested. Witnesses may be present only when they are giving information to the board.

(b) Only board members and persons whom they request may be present during board deliberations.

(c) The presiding officer may direct any person who willfully interrupts, disturbs, or disrupts the hearing to leave. Failure to leave when requested by the presiding officer is a misdemeanor punishable by imprisonment of not more than six months or a fine of $250, or both.

Comment: G.S. 115C-325(j)(1) was amended in 1973 to require that the hearing be private.

G.S. 143-318.17 authorizes the presiding officer to evict anyone who disrupts an official hearing of a public body and makes failure to leave when directed to do so by the presiding officer a misdemeanor. See also G.S. 14-273 and G.S. 14-288.4.

Section 22. *Transcript of the Hearing.* The hearing board shall record any information presented orally at the hearing. A transcript of the hearing shall be provided the teacher at board expense, if the teacher requests it in contemplation of an appeal to the superior court.

Comment: G.S. 115C-325(l)(5) and -325(n) require the board to give the teacher a transcript if he requests it in contemplation of an appeal to the superior court. The transcript may be in the form of notes taken by a secretary (not the superintendent) or a tape-recording of the hearing.

The least expensive way to provide a record is to tape-record the proceedings. If the teacher appeals, the tape can then be transcribed and a copy made available to the parties. Untranscribed tapes should be retained for at least 30 work days, the period in which the teacher may appeal to the superior court.

Section 23. *Custodian of Evidence.* The presiding officer shall be responsible for the safekeeping of all written matter and other physical evidence presented at the hearing.

Section 24. *Teacher's Counsel.* The teacher may be accompanied by legal counsel or another person at the hearing. This person may act as counsel in the teacher's defense, with the right to present witnesses, question witnesses, make a statement on the nature of the evidence and the proper disposition of the case, and otherwise assist the teacher.

Comment: The teacher has a statutory right to be accompanied by legal counsel or another individual [G.S. 115C-325(j)(3)]. The statute and federal constitutional law, however, do not require that an attorney be appointed to represent the teacher. In an evidentiary hearing on termination of welfare payments, the United States Supreme Court found that the recipient must be allowed to retain an attorney, but an attorney need not be provided for him.[24] This case has been cited as authority on the issue of one's right to counsel in administrative hearings and appears to be applicable to the teacher-dismissal proceeding.

Section 25. *School Board Attorney*

Option 1. The school board attorney may assist the school administration in preparing the evidence against the teacher, but at the hearing he shall either (a) assist the administration in presenting the case against the teacher[25] or (b) serve as the law officer who advises the board and the other parties on questions of law, such as the admissibility of evidence and the statutory and administrative law on teacher dismissal. He shall not perform both functions at the hearing.

Option 2. The school board attorney may either (a) present or help present the charges and evidence to support the charges against the teacher

24. Goldberg v. Kelly, 397 U.S. 254 (1970).

25. In Thompson v. Wake County Bd. of Educ., 31 N.C. App. 401 (1976), *rev'd on other grounds*, 292 N.C. 406 (1977), the teacher objected to the board attorney's questioning the witnesses. He alleged that the attorney's participation in certain exchanges reflected bias against the teacher that constituted a denial of procedural due process. The court of appeals rejected this contention and the assertion that it was improper under G.S. 115C-325(i)(3) for the board to have its attorney participate in the hearing, since the statute entitles the superintendent and the teacher to be represented by legal counsel but says nothing about the board.

or (b) serve as legal adviser to the board and law officer at the hearing. He may not perform both functions. If the school attorney performs the prosecutorial role of presenting the evidence against the teacher, the board may obtain other counsel to advise it and the other parties on questions of law concerning the discharge that arise before, during, and after the hearing. If the board attorney does not present the case against the teacher or assist in the presentation, he shall serve as legal adviser to the board and answer all questions of law, such as the admissibility of evidence and the statutory and administrative law on teacher dismissal, that may arise before, during, and after the hearing.

Comment: Recent litigation has challenged some of the ways in which school board attorneys have participated in hearings on student expulsions and teacher discharges. The results have been mixed. Pennsylvania courts have adopted a strict rule that requires a school attorney to assume either an adversary role or a judicial role in student suspension hearings[26] and teacher dismissals[27] and demotions.[28] The attorney may not assume both roles, since to act as both prosecutor and adviser to the school board would violate the state constitutional requirements of due process.[29]

Federal courts have taken a less strict approach. For example, a federal district court in Pennsylvania held that due process was not violated when a school attorney acted as both judge and prosecutor at a student expulsion hearing.[30] The court was concerned with the cost and general undesirability of overly formal disciplinary procedures. It found

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26. Appeal of Feldman, 21 Pa. Commw. 451, 396 A.2d 895, 896 (1975).

27. English v. North East Bd. of Educ., 22 Pa. Commw. 240, 348 A.2d 494 (1975). This strict separation rule was relaxed somewhat in a more recent Pennsylvania reduction-in-force decision that involved an assistant principal who was transferred to a lower paying position. He argued that he was denied procedural due process because the board attorney had functioned as both prosecutor and judge. The board attorney had helped the superintendent prepare the demotion letter and ruled on questions at the hearing at which the board attorney denied the assistant principal's objection to the superintendent's form of testimony. The court rejected the claim, pointing out that the board attorney carefully avoided both actively questioning the witnesses and formally objecting to questions asked by the assistant principal or his attorney. Sharon City School Dist. v. Hudson, 34 Pa. Commw. 278, 385 A.2d 249 (1978).

28. *See* Brown v. School Dist., 53 Pa. Commw. 493, 417 A.2d 1337 (1980), which rejected the contention of a principal who had been demoted to a teacher that there was improper commingling of functions when (a) the school solicitor presented the school's case against him; (b) the board president, an attorney, ruled on objections; and (c) a board member who was an attorney advised the board during the hearing and decision-making process.

29. *Accord*, Gonzales, v. McEuen, 435 F. Supp. 460 (C.D. Cal. 1977).

30. Alex v. Alex, 409 F. Supp. 379, 387 (W.D. Pa. 1976). *See also* Potemra v. Ping, 462 F. Supp. 328 (S.D. Ohio) (teacher discharge); and Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976), which expressly upheld the combination of investigative and judicial roles in a school board hearing on teacher discharge. *Accord*, Withrow v. Larkin, 421 U.S. 35 (1975).

that "[a]s long as the student is given a formal hearing by the school board and is represented by counsel, . . . it is reasonable for the school solicitor to prosecute the case against him or her, rule on evidentiary questions, and advise the board as to probable action."[31] State courts in Michigan and North Carolina also have rejected the strict Pennsylvania rule. The Michigan Court of Appeals in 1979 and again in 1981 declined to adopt "a per se rule that would require reversal whenever an attorney performs both functions."[32] The North Carolina Court of Appeals also rejected a per se rule, overruling a teacher's objection to the school attorney's both advising the board and cross-examining the teacher's witnesses.[33] Courts in Illinois[34] and Wyoming[35] have found a denial of procedural due process when the school attorney assumed both roles, but they did so only after examining how the attorney performed those roles and finding that a fair hearing had been denied because of clear bias or prejudice by the board attorney.

To avoid unnecessary litigation and possible reversal of board action because of questions about the proper role of the board attorney, the prosecutorial and adjudicatory functions should be separated at the hearing.[36] The foregoing options provide for this separation. Option 2 requires separation at all stages of the dismissal and is preferable if the board can do without a law officer at the hearing or can afford separate counsel. If not, Option 1 should work. It provides for separation at the critical point of the hearing, where the superintendent should present the case for dismissal while the board attorney serves as a law officer who answers questions and gives advice to the board of education.

Section 26. ***Evidence Over Three Years Old.*** Except when a teacher has been convicted of a felony or a crime involving turpitude, the board may not base a dismissal on conduct or actions that occurred more than three years before the superintendent's written notice to the teacher stating his intention to recommend dismissal. But it may receive evidence that is over three years old in order to understand the background of the case before it.

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31. Alex v. Alex, 409 F. Supp. at 388.

32. Niemi v. Board of Educ., 103 Mich. App. 818, 303 N.W.2d 905, 907 (1981). *See also* Arnold v. Crestwood Bd. of Educ., 87 Mich. App. 625, 277 N.W.2d 158 (1978).

33. Thompson v. Wake County Bd. of Educ., 31 N.C. App. 401, 414 (1976), *rev'd on other grounds*, 292 N.C. 406 (1977).

34. Yesinowski v. Board of Educ., 28 Ill. App. 3d 87, 328 N.E.2d 23 (1975).

35. Monahan v. Board, 486 P.2d 235 (Wyo. 1971).

36. *See* Miller v. Board, 51 Ill. App. 2d 20, 200 N.E.2d 838 (1964), which recommended retaining an independent attorney to advise the board at discharge hearings. *Accord*, Yesinowski v. Board, 28 Ill. App. 3d. 87, 328 N.E.2d 23 (1975).

Comment: This limitation on evidence is based on G.S. 115C-325(e)(4), which prohibits a dismissal based on conduct that occurred more than three years before the superintendent's recommendation, with the exception noted. However, the North Carolina Court of Appeals ruled in a 1979 teacher dismissal case that the prohibition applies only to evidence on which the decision is based—the board may hear it in order to understand the background of the case.[37]

Section 27. *Proposed Decision by Winning Party.* The presiding officer may request that *the winning party* [each side[38]] submit a proposed decision including a brief summary of the proceedings, findings of fact, and conclusions of law with a copy to the other party. The proposed decision shall be filed within three calendar days after the hearing is over, and the board may refuse to consider a proposed decision not filed within that time.

Comment: This section works best when the teacher is represented by an attorney and the school board attorney has assisted the superintendent in presenting the proposed discharge. There is no reason why the board should not take advantage of the experience and expertise of the attorneys by having the lawyer for the prevailing party propose suggested findings of fact and conclusions of law. When the school attorney helps put on the case against the teacher, there should be no problem of his proposing what may become the board's decision so long as he does not later advise the board on this dismissal as the board attorney. Of course, if the school attorney has not helped to prepare or present the case for dismissal, the board can call on him to help draft its findings, conclusions, and order.

The three-day limitation is intended to permit the board to render its written decision within the five work days required by G.S. 115C-325(l)(5).

Section 28. *Disposition of the Case.* The school board shall decide by a majority vote whether the grounds for the recommendation are true and substantiated. If it finds that the grounds are true and substantiated, it shall determine by majority vote whether dismissal is warranted.

The board's decision shall rest solely on the evidence properly presented at the hearing. The board shall, in a written report, briefly summarize the proceedings, state its findings of fact, make the conclusions of law and set forth its decision. The presiding officer or his designee shall write the report

37. Baxter v. Poe, 42 N.C. App. 404 (1979).

38. *See* State v. Milwaukee Bd. of School Directors, 14 Wis. 2d 198 (1961), which suggests that it is better practice to afford both parties a similar privilege of submitting proposed findings of fact and conclusions of law. But the Wisconsin Supreme Court upheld a board practice of having the board attorney prepare the findings and conclusions.

and order of the board. A copy shall be delivered to the teacher and the superintendent.

If the board determines that the grounds are not supported by substantial evidence, the matter shall be terminated and no further action may be taken against the teacher on the basis of the charges unless new evidence becomes available.

Comment: The requisite of a fair hearing is a finding based only on the evidence presented at the hearing and on the applicable legal rules.[39] While the rules governing the admissibility of evidence in a court of law are not applicable to the dismissal hearing, the board must determine the weight of the evidence and must consider only reliable evidence.

This section requires the board to make conclusions of law, which seems an inappropriate function for a lay board of education. It is required because the North Carolina Supreme Court reversed a school board decision to dismiss a teacher because it failed "to make findings of fact and conclusions of law."[40] Unless the Supreme Court changes this requirement, the board of education is responsible for making "conclusions of laws" in teacher dismissals.

Form 4 in the Appendix is a proposed form for setting forth the findings and order of the board.

The teacher may appeal the board's decision to the superior court within 30 days after he is notified of the board's decision. [See G.S. 115C-325(n).] The North Carolina Court of Appeals has ruled that the teacher is not entitled to a trial de novo in the superior court. The board decision stands unless the court finds one of the flaws specified in the Administrative Procedure Act (G.S. 150A-51) as an error on which agency decisions may be reversed. The court may not weigh the evidence and substitute its evaluation for the board's.[41]

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39. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

40. Weber v. Board of Educ., 301 N.C. 83 (1980).

41. *See, e.g.*, Thompson v. Wake County Bd. of Educ., 31 N.C. App. 401 (1976), *rev'd on other grounds*, 292 N.C. 406 (1977). *Accord*, Frison v. Franklin County Bd. of Educ., 596 F.2d 1192 (4th Cir. 1979).

Code IV

Reductions in Force: Termination Because of Enrollment Decline, Financial Exigency, or Program Change[42]

Unlike the preceding discharge procedure, this proposed policy is not keyed to a particular state tenure act. Like the discharge model, however, this model applies only to teachers, administrators, and other certified personnel; noncertified employees—such as clerical assistants, cafeteria workers, aides, and maintenance or transportation personnel—are excluded because most of them serve at the pleasure of the board or on short-term contracts. When they must be laid off, there usually is little difficulty in giving noncertified employees reasonable notice before termination. The board may wish to provide procedures for terminating them that differ from this one. But if it decides that noncertified personnel should be included in this policy, the definitions must be changed to include these employees, appropriate references in the policy should be changed from "teacher" to "employee," and the membership of the "faculty committee"should be expanded to include one or more representatives of this noncertified employee group.

Before a board adopts this model, it is important that it determine whether any part conflicts with the state statutes or state board of education regulations or with the unit's collective bargaining contract. To the extent that the model does conflict, either it must be modified or changes must be obtained in the statute, regulation, or contract.

North Carolina's Tenure Act (G.S. 115C-325) requires the same procedure for a reduction in force (RIF; the verb is "rif") because of a district

42. *See* R. PHAY, REDUCTION IN FORCE: LEGAL ISSUES AND RECOMMENDED POLICY (Topeka, Kansas: NOLPE, 1980), for an analysis of the case law in the area of reductions in force. This subject is also examined in a series of four articles in the Institute of Government's SCHOOL LAW BULLETIN, beginning with the April 1980 issue.

reorganization, decreased enrollment, or decreased funding as it does for a discharge for cause. In these two situations the statutory procedure, not this model, must be the procedure used in a layoff. The standard contract form furnished by the State Board of Education also states that employment may be terminated because of financial exigency or because a position has been eliminated.[43] School boards that are not bound by such statutes, which include the North Carolina community college institutions, should find this model a good RIF policy. Moreover, schools and colleges that are bound by a detailed statutory procedure may want to use this model for laying off noncertified employees.

Section 1. *Definitions.* The following terms shall have the meanings indicated:

(a) "Termination" shall mean the cessation of employment of a teacher or other certified employee before the end of a tenured or probationary appointment for reasons of financial exigency or program change. The nonreappointment of an employee on a specified term appointment shall not be a termination, and no objection to a nonreappointment may be filed under this procedure.

(b) "Teacher" shall mean . . . [insert statutory definition, if appropriate, but be sure to include administrators (principals, supervisors, and assistant and associate superintendents) within the definition].

(c) "Financial exigency" shall mean any significant decline in the board of education's financial resources that is brought about by decline in enrollment or by other action or events that compel a reduction in the schools' current operations budget.[44]

(d) "Program change" shall mean any elimination, curtailment, or reorganization of a curriculum offering, program, or school operation or a reorganization or consolidation of two or more individual schools or school districts that is unrelated to financial exigency.

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43. The contract form provided by the North Carolina State Board of Education for employing public school "professional" employees (it had been a mandated form) provides that (a) the employment of persons to fill state-supported positions is subject to the allotment of personnel by the State Board of Education, and (b) the amount of salary paid from state funds must be within the state's allotment of funds made to the local school district. The contract form provides further that federal and locally supported positions are "subject to the availability of federal and local funds" and that "when the position for which the employee is employed, whether State, federal, or locally-supported position, is terminated this contract shall be terminated."

44. For a discussion of what constitutes financial exigency, *see* Note, *The Dismissal of Tenured Faculty for Reasons of Financial Exigency*, 51 Ind. L.J. 417 (1976). For a case in which a community college alleged declining enrollment but the court found that claim to be a subterfuge to discharge a teacher because of criticism of the president, *see* Duarte v. Mills, No. C-C-76-230 (W.D.N.C. 1979), digested in 11 School Law Bull. (January 1980).

(e) "Faculty committee" or "committee" means a committee to be constituted from the certified employees (teachers, principals, and supervisors, but not the superintendent or assistant superintendents). The committee, which shall consist of not less than _____ members, shall be selected on the basis of broad representation of the district's various schools. [It shall include at least one principal and one supervisor.] It shall be empowered to discharge the functions prescribed for it in this policy.

(f) "Day," except where calendar day is specified, means every day including Saturdays, Sundays, and teacher work days, but it does not include official school holidays like Thanksgiving and Christmas.

> **Comment**: The board also may want to enlarge the definition of termination to add these personnel decisions to the actions covered by this RIF policy: (1) transfer to a lower-paying position, (2) reduction to part-time employment, and (3) reduction in pay.

Section 2. *General Grounds for Termination.* Employment may be terminated when the board decides that because of (i) a [demonstrable bona fide] financial exigency or (ii) a program change for [demonstrable bona fide] institutional reasons, the board's contractual obligation to one or more teachers or administrators cannot be further met. Such a decision shall be made and any resulting termination shall be effected only in accordance with the procedure provided in this RIF policy.

> **Comment**: The modifying phrase "demonstrably bona fide" is recommended by the American Association of University Professors in its Recommended Institutional Regulations on RIF. If this phrase is to be included in the board policy, the board should recognize that it has a very heavy but not insupportable burden of proving that a financial exigency exists or that institutional reasons require the program change that compels the RIF.

Section 3. *Board's Preliminary Determination and Statement.* If the board decides that (i) a state of financial exigency exists or is imminent or a program change has occurred or should seriously be considered and (ii) termination of the employment of one or more teachers may be a required consequence of either circumstance, it shall forthwith prepare a statement that identifies with reasonable particularity the state of financial exigency or the program change. The statement shall outline in terms as specific as the circumstances permit the options for response readily apparent to the board at the time, including any options that would or might involve termination of employment. This statement shall be transmitted forthwith to the faculty committee, with a request for its action in accordance with the provisions of Section 4. This committee shall be appointed by the board in accordance

with Section 1(e). Simultaneously, a summary of the statement shall be published by any means reasonably calculated to bring it to the attention of all teachers, together with a statement that the subject has been referred to the faculty committee for action. Pending committee action, the board shall undertake, either directly or through the superintendent's office, to obtain advice and recommendations with respect to the matters addressed in the statement from all administrators and supervisors whose schools or units might reasonably be affected by the adoption of any identified option involving termination.

> **Comment:** If the board must consider the need to reduce force each time it adopts the budget, it may want to rewrite this statement to require a determination by a certain date as to whether projected enrollments and financial resources will be adequate to maintain the school district's education program at substantially the same level for the upcoming year. Some RIF policies provide for such an annual determination.

Section 4. *Committee Action.* The committee shall consider the matters identified in the board's statement in order to give its advice and recommendations thereon to the board. In this function the committee acts as representative of the employees' interests in both their personal concerns and their professional concerns for the school district's educational program. The committee is entitled to further information reasonably available to the board or superintendent, including any clarification of the situation by the board in light of information now available. Within fifteen calendar days after it receives the board's statement, the committee shall submit to the board its written report, including any minority reports. The report shall contain advice and recommendations addressed to the precise circumstance and optional responses identified in the board's statement, and it may suggest other responses or courses of action for the board's consideration or adoption. The report may be accompanied by any communications and other data considered by the committee.

Section 5. *Board's Decision.* Within thirty days after it receives the committee's report and having due regard for the advice and recommendations received from both the committee and the school administrators, the board shall determine whether any option involving terminations must be retained as a possible response. If it determines that, in view of other available options, it need not consider further any option involving termination, it shall so notify the superintendent, the committee, and the faculty. If it determines that, on the basis of all information then available, it must take action that will [or reasonably might] involve termination, it shall transmit to

the superintendent a statement that (i) designates the particular schools or areas of school operation in which it thinks termination should be effected and (ii) sets forth the criteria for the superintendent to use in selecting individual teachers for termination of employment.

> **Comment:** Many types of criteria for determining whom to lay off have been used in RIF procedures. In a few states a board can lay off a tenured teacher and keep a probationary teacher, both of whom are certified in the same area, if that action is best for the educational program. In these states it is important that the board reserve this authority in its RIF regulations. Even more important, no board should be tied to a strict seniority rule when it is determining which tenured teacher among a group of tenured teachers (or which nontenured teacher among a group of probationary teachers) must be laid off. Although this model contains neither methods of grouping teachers by function nor a system for evaluating individual teachers within such groups, I recommend that the board adopt general criteria for selecting teachers for termination. **These criteria should provide that the primary consideration shall be the maintenance of a sound and balanced educational program that is consistent with the functions and responsibilities of the school district.** Secondary considerations should include [tenure status,] length of service in the district, degrees earned, and other factors deemed relevant by the board.

Section 6. *Superintendent's Action.* Within ten days after he receives the statement, the superintendent shall submit to the board his recommendations for terminating the employment of particular teachers. In making his recommendation he shall not be limited to considering only the teachers in the areas or programs designated by the board in its initial statement. He shall not make his recommendation until he has consulted with each principal or supervisor in whose school or unit a termination is proposed.

Section 7. *Notice to the Individual Teacher*

(a) *Contents.* If, after considering the superintendent's recommendation, the board acts to terminate employment, it shall give written notice of that fact by registered mail, return receipt requested, to the teacher to be terminated. The notice shall include a statement of the conditions requiring termination of employment, a general description of the procedures followed in making the decision, and a disclosure of pertinent financial or other data on which the decision was based. The teacher's address, as it appears on the school district's record, shall be deemed to be his correct address. It shall be the teacher's responsibility to see that the school or institution has his current address on file.

(b) *Timeliness.*

(1) Program change. When termination is based on program change unrelated to financial exigency, a teacher on tenured appointment shall be given not less than 180 calendar days' [twelve months'] notice before the termination becomes effective. A teacher on a specified term contract shall be given not less than 45 calendar days' notice during the first year of service, not less than 60 calendar days' notice during the second year of continuous service, and not less than 90 days' notice after two or more years of continuous service. The notice requirements for nontenured faculty, however, shall apply only to termination in the middle of the teaching contract and shall not operate to extend the regular notice requirement for nonrenewal of a contract.

(2) Financial exigency. When termination is based on financial exigency, the board shall make every reasonable effort, consistent with the need to maintain sound educational programs and within the limit of available resources, to give not less than 60 calendar days' notice before terminating the employment of a tenured teacher or a nontenured teacher before the end of the employment period. But if it is not possible to comply with the *statutory* [regular] notice requirement for nonreappointment of a nontenured teacher, the board shall give as much notice as is possible in a time of financial exigency.

Comment: The notice time that must be given for a layoff occasioned by program change is much longer than the notice time for financial exigency. Furthermore, a minimum notice time is provided for layoffs because of program change. The reason for the different notice requirements is that the two grounds for termination are fundamentally different. A financial exigency can arise with little or no notice to the board, while a program change is much more deliberate and lacks the emergency nature of a financial exigency.

Section 8. *Review of Individual Terminations.*

(a) *Request for a Hearing.* Within ten days after receiving a notice of termination, a teacher may request a review of the action by the *board of education* [hearing examiner charged with conducting hearings on a reduction in force]. Review may be had solely to determine whether the decision to terminate was arbitrary or capricious with respect to that individual.

The request for review must be in writing and addressed to the chairman of the board. It must specify the grounds on which it is contended that the decision was arbitrary or capricious and must include a short, plain statement of facts that the employee believes support the contention.

Submission of such a request constitutes on the part of the teacher (i) a representation that he can support his contention by factual proof, and (ii) an agreement that the school may offer in rebuttal of his contention any relevant data in its possession.

The board shall consider the request and shall grant a hearing if it determines (i) that the request contains a bona fide contention that the decision to terminate was arbitrary or capricious, and (ii) that the facts suggested, if established, might support the contention. A denial of the request shall finally confirm the decision to terminate, and the board shall so notify the teacher. If the request is granted, a hearing shall be held within ten days after the request is received; the teacher shall be given at least five days' notice of the hearing.

> **Comment:** The board of education may prefer that the RIF appeal go to a hearing examiner rather than back to the board. If so, the term "hearing examiner" must be substituted for the word "board." Also, a new section must be added that provides for the hearing examiner and for an appeal on the record, not de novo, to the board.

(b) *Conduct of the Hearing.* The hearing shall be conducted informally and in private, with only the members of the board, the teacher, the superintendent, and such witnesses as may be called in attendance, except that the teacher and the superintendent may each be accompanied by a person who may give counsel *but not participate directly in this hearing* [and otherwise represent the party]. A quorum for purposes of the hearing shall be a simple majority of the board's total membership. A board member who has a significant conflict of interest shall disqualify himself. If a board member with a significant conflict does not disqualify himself, the board shall adopt a motion to disqualify him. If the teacher asks for a transcript of the proceeding and the chairman approves the request, the transcript shall be made and given to the teacher [without charge or with a bill for the cost of preparing it if the chairman so decides.] [If the chairman denies the request for a transcript, the teacher may transcribe the proceeding.] The board shall consider only such evidence as is presented at the hearing, and it need consider only the evidence that it considers fair and reliable. All witnesses may be questioned by the board members, the teacher, and the superintendent [and the representative of the teacher and the superintendent]. Except as herein provided, the conduct of the hearing shall be under the chairman's control.

The hearing shall begin with the teacher's presentation of contentions, limited to those grounds specified in the request for a hearing and supported by such proof as he desires to offer. When this presentation is concluded, the board shall recess to consider whether the proof offered in support of the

contention establishes the contention, unless it is rebutted. If it determines that the contention has not been so established, it shall so notify the parties and conclude the proceedings, which action shall finally confirm the decision to terminate. If it determines that rebuttal is desirable, it shall so notify the parties and the hearing shall proceed. The superintendent shall then present, in rebuttal of the teacher's contention or in general support of the decision to terminate, such testimonial or documentary proofs as he desires to offer, including his own testimony.

After the superintendent completes his presentation, the board shall consider the matter in executive session. The burden shall be on the teacher to satisfy the board by a *preponderance of the* [clear and convincing] evidence that the decision to terminate was arbitrary or capricious.

(c) *Procedure After Hearing.* If the board determines that the teacher's contention has not been established, it shall, by a simple unelaborated statement, so notify the teacher and the superintendent. Such a determination shall finally confirm the decision to terminate. If the board determines that the teacher's contention has been established, it shall so notify him and the superintendent by a written notice that states what corrective action must be taken. [If the hearing examiner determines that the teacher's contention has been established, he shall so notify the teacher, the superintendent, and the board by a written notice that includes a recommendation for corrective action to be taken by the board.]

Section 9. *Obligations with Respect to Re-employment and Finding Other Employment.*

(a) For one year after the effective date of a termination pursuant to this policy's provisions, the school board shall *not replace the teacher whose employment has been terminated without first offering the position to the terminated teacher* [offer to a teacher who has been terminated any position that becomes available for which he is both certified (when certification is required) and qualified. If several former teachers are both certified and qualified for a position that is now available, the board, after receiving the superintendent's advice, shall select the teacher it thinks will best fill the position].

The offer of re-employment shall be made by registered mail, return receipt requested, and the teacher shall be notified that if he wishes to accept he must do so in writing within fifteen calendar days. Failure to accept within fifteen calendar days or rejection of the position eliminates all re-employment rights of the teacher.

(b) A tenured teacher who has been laid off and re-employed within three years shall be reinstated as a tenured teacher. A probationary teacher who is laid off may, *at the board's discretion, be given a maximum credit of two*

years [shall be given no credit] for the time already served as a probationary teacher for purposes of determining when he is eligible to be considered for tenure, if he is later re-employed.[45]

(c) A teacher who is recalled within one year shall have restored to him all of the sick leave and unused personal leave he had accrued on the effective date of his layoff.

(d) When requested by the person whose employment has been terminated, the school shall give him reasonable assistance in finding other employment.

> **Comment:** The board will need to establish a basis for determining who, among those teachers who were laid off, will be given the first choice at any position that becomes available. It is recommended that the board's obligation with respect to re-employment be limited to not filling a position that was once held by a teacher who was laid off without first offering the position to that teacher. Most RIF procedures give greater re-employment rights to laid-off teachers than does this policy.

Section 10. *Exclusive RIF Procedure.* This procedure is the only one that may be used in a reduction in force. Any existing procedure for reconsidering or examining an employee discharge, nonreappointment, or grievance is not available for considering an issue that arises from a reduction in force. Similarly, no personnel action other than a reduction in force may be considered under this procedure.

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45. A North Carolina board of education will need to adopt the "no credit" option in order to comply with G.S. 115C-325(c), which requires a probationary teacher to serve for three consecutive years before the board may confer tenure on him. The first sentence dealing with the re-employment of a tenured teacher within three years is consistent with G.S. 115C-325(c)(3), which allows a board to re-employ as tenured a teacher who had been tenured by that school board and seeks re-employment within five years after having resigned his position.

Code V

Dismissal of a Superintendent with a Contract for a Specified Term

Most school superintendents serve at the pleasure of their boards. However, a growing number of boards are appointing the superintendent to a specified term, and in many states, like North Carolina, a board is required to give a two- or four-year contract. This code adopts the grounds for discharge that are specified by the North Carolina statutes [G.S. 115C-274(a) and G.S. 115C-274(b)], which are typical of the grounds found in most state statutes. A school board in another state will need to list that state's statutory grounds rather than these. If the state statute and state board of education regulations do not specify, the grounds listed in Code VI for dismissing assistant superintendents is recommended. The procedure recommended here can be adopted by any school board as long as the board is sure that it does not conflict with any statutory requirement, state board regulation, or collective bargaining contract.

A. Basis for Dismissal

Section 1. *Permissible Basis for Dismissal.* The superintendent of the _____ School Administrative Unit may be dismissed during the contract period for one of the following reasons:

(a) Immoral conduct;
(b) Disreputable conduct;
(c) Failure or refusal to perform the duties required of him by law or by his board of education.

Comment: The North Carolina statutes G.S. 115C-274(a) and G.S. 115C-274(b) set out the grounds and require a board hearing on the removal of a school superintendent during the contract period. This

provision restates the statutory grounds for dismissal. The board may want to define the vague terms "immoral and disreputable conduct."

This code does not apply to the nonrenewal of a contract. The board of education may refuse to renew a superintendent's contract for any reason it deems sufficient, and it need give no reason or explanation.

B. Procedure for Dismissal

Section 2. *Investigation.* The board of education has the full responsibility for dismissing the superintendent. If any board member has information about the superintendent that would constitute a basis for dismissal, the board chairman or his designee shall investigate the charges and review all available information.

The investigation shall include an interview with the superintendent, at which he will be permitted to raise any defense he thinks relevant. Before the interview begins, the superintendent shall be advised of the purpose of the interview and the charges against him. If the superintendent requests that other witnesses be questioned, the investigator shall interview them if possible.

Comment: This section requires what has been the usual practice when a board of education thinks that a superintendent is guilty of conduct that will require his dismissal. It imposes no new burden on the board.

The investigation is intended to be informal and to give the board chairman or his designee a basis for reaching a preliminary determination on whether the charges are valid and whether dismissal is the appropriate action. The investigator should be a neutral party and not one who is directly involved in bringing the charges to the board. If the board chairman is so involved, he should appoint a board member or the board attorney, who can investigate the charges as a more nearly neutral party.

It is my recommendation that the board attorney or another neutral non-board member conduct the investigation. If the board chairman or another board member conducts this investigation, he becomes the logical person to put the case before the board if the superintendent requests a hearing. It would then be necessary for the chairman to remove himself from the board so as not to be both prosecutor and hearer. If the board attorney performs the duties of the investigator, this conflict is removed. See Section 9 for the designation of the presentor of the charges.

Section 3. *Investigator's Recommendation.* After completing his investigation, the investigator shall report his findings to the board. The report shall list the charges made against the superintendent and summarize the evi-

dence that substantiates or refutes those charges. The report may, but need not, include a recommendation by the investigator as to whether dismissal is warranted.

Section 4. *Board's Decision to Dismiss.* Within fourteen days after receiving the investigator's report, the board of education shall decide whether to dismiss the superintendent.

> **Comment:** The decision to dismiss the superintendent rests with the board. The investigator may recommend what action he considers appropriate, but the board need not follow that recommendation.

Section 5. *Board's Notice of Dismissal.* If the board decides to dismiss the superintendent, it shall notify him of this decision by certified mail. This notice shall contain:

(a) A list of the charges upon which the dismissal is based.
(b) A summary of the evidence and the names and positions of the accusers.
(c) A statement that the superintendent has a right to a hearing before the board if he requests it within seven days after he receives the notice.
(d) A copy of this code.

> **Comment:** This section requires the board to notify the superintendent by certified mail of its intention to dismiss him and the grounds and evidence on which the dismissal is based. This notice allows the superintendent time to decide whether to request a board hearing and to prepare a defense. Constitutional due process standards of adequate notice entitle the superintendent to full knowledge of the offense charged, the basis of the charge, the nature of the hearing, and the opportunities for defense.

Section 6. *Board Hearing Waived.* If the superintendent does not request a hearing before the board of education within seven days after he receives the notice provided in Section 5, it shall be presumed that he has waived his right to a hearing. The board may then by resolution dismiss him.

Section 7. *Board Hearing Requested.* If the superintendent requests a hearing, the board shall schedule it at the earliest possible date, but not sooner than five days after the superintendent receives notice of the date. However, if both he and the board desire an earlier date and can agree to it in writing, the board may set an earlier hearing time. The superintendent may request a delay, which shall be granted when sufficient reason is shown.

Section 8. *Composition of the Hearing Board*

(a) *The Hearing Board.* The [name of local school unit] Board of Education shall act as the hearing board. A quorum consists of a majority of the members.

(b) *The Presiding Officer.* The chairman of the board of education, or another board member designated by the chairman, shall be the presiding officer. The presiding officer shall have the following duties and powers:

(1) He schedules the hearing at a specified date, time, and place. He may postpone the date and time or change the place for good cause.
(2) He assures the presence of a quorum at the meeting.
(3) He is available before the hearing to answer any questions that the superintendent or his representative may have about the nature and conduct of the hearing.
(4) He has full charge of the hearing, with authority to direct its proceedings and control the conduct of all persons present, subject to the general directions of this procedural code. He may limit questioning that is unproductively long or irrelevant.
(5) He votes only to break a tie.
(6) He writes the board's findings of fact and decision. He may delegate this responsibility to another board member.

Comment: The board needs an executive to make arrangements of time and place and properly notify all participants. Some one person must be in charge of the hearing, have the authority to say "who can do what," and maintain order at the hearing. These duties and decisions have been assigned to the school board chairman as the logical presiding officer.

Section 9. *Presentor of the Case.* The board shall designate the person to present the charges and evidence against the superintendent at the hearing. When feasible, the person who conducted the preliminary investigation shall be designated. If the chairman or another board member is chosen as the presentor, he automatically is removed from the board for the purpose of hearing and deciding the disposition of the charges against the superintendent.

Comment: As noted in the comment to Section 2, it is best that a board member not investigate the charges against the superintendent. The school board attorney is the best person to handle the investigation and later to present the case against the superintendent when a hearing has been requested. But if the board attorney is designated the presentor, he should not serve as legal adviser to the board on any issue arising out of the discharge. If the board thinks that legal counsel is needed at the hearing, it can retain another attorney for this purpose.

Section 10. *Hearing Procedure.* The hearing shall begin with the superintendent's presentation of the charges and the evidence to support those charges. The presentor's witnesses shall be subject to cross-examination by the superintendent. The superintendent may then present any evidence to refute or explain the charges and evidence already introduced. The superintendent's witnesses also shall be subject to cross-examination. If the board desires additional witnesses, it may call them on its own authority. (See Section 13.)

Section 11. *Evidence.* Witnesses shall testify in person whenever possible. If a necessary witness cannot testify in person, his sworn statement may be substituted. The hearing board shall consider only such evidence as it deems to be fair and reliable.

> **Comment:** Courts have uniformly ruled that school board hearings need not be conducted on the basis of the rules of evidence used in a court of law. To do so, courts have said, would impose intolerable burdens on the school board. This section recognizes the difficulty of applying such rules and leaves to the board the determination of what evidence should be considered and the weight it should be given. See Section 13 for the rule on questioning witnesses.

Section 12. *Superintendent's Statement.* The superintendent may testify in his own defense and may be questioned on his testimony. If he chooses not to testify, his refusal shall not be considered as evidence in determining the validity of the allegations, and he shall not be punished later for refusing to testify.

> **Comment:** Although most courts have held that the Fifth Amendment provisions do not apply to a school board proceeding, the board, as a matter of policy, should not seek to prove the grounds of dismissal from the superintendent's refusal to testify.

Section 13. *Questioning of Witnesses.* Members of the hearing board, the superintendent and his representative, and the presentor of charges may examine all witnesses who testify before the board, including the superintendent and the presentor. Witnesses shall testify under an oath or affirmation administered by a board member. The presiding officer may limit unproductively long or irrelevant questioning.

> **Comment:** The school board may use any of several oaths in swearing witnesses, including the following one, adapted from G.S. 11-11:

Do you solemnly swear (or affirm) that the evidence you shall give to this hearing before the _____ Board of Education shall be the truth, the whole truth, and nothing but the truth; so help you, God?

Section 14. *Subpoena of Witnesses.* If the hearing board finds it necessary to have a witness appear and testify at the hearing and the witness refuses after being requested to appear, the board may issue a subpoena to compel his presence.

Comment: G.S. 115C-45(a) authorizes the school board to issue subpoenas for witnesses "in any and all matters which may lawfully come within the powers of a board and which, in the discretion of the board, requires investigation." This subpoena power can be used at the request of either the superintendent or the presentor.

Section 15. *Public Hearing*

(a) The hearing shall be private, although a final action on discharge shall be taken in an open meeting.

(b) The hearing may be attended only by the members of the board of education, the presentor of charges, the school attorney or specially retained counsel for this hearing, and the superintendent and his representative. However, on request the presiding officer may allow impartial observers or members of the superintendent's family to attend. Witnesses may be present only when they are giving information to the board.

(c) Only board members and persons whom they request may be present during board deliberations.

(d) Any person who willfully interrupts, disturbs, or disrupts the hearing may be directed to leave by the presiding officer. Failure to leave when requested to do so by the presiding officer is a misdemeanor punishable by imprisonment for not more than six months or a fine of $250, or both.

Comment: G.S. 143-318.17 authorizes the presiding officer to evict anyone who disrupts an official hearing.

Section 16. *Transcript of Hearing.* The hearing board shall record any information orally presented at the hearing and shall provide a transcript of the hearing to the superintendent at board expense, if he requests it.

Comment: The transcript may be in the form of notes taken by a secretary or a tape-recording of the hearing. The most convenient and least expensive way to provide a record is to tape-record the proceedings. If the superintendent sues the board, then the tape can be transcribed and a copy made available to the parties. Untranscribed tapes should be retained for at least 30 days.

Section 17. *Custodian of Evidence.* The board chairman shall be responsible for the safekeeping of all written matter and other physical evidence presented at the hearing.

Section 18. *Superintendent's Counsel.* The superintendent may be accompanied by legal counsel or another person at the hearing. This person may act as counsel in the superintendent's defense, with the right to present witnesses, to question witnesses, to make a statement on the nature of the evidence and the proper disposition of the case, and otherwise to assist him.

Section 19. *School Board Attorney*

Option 1. If the school board attorney has not been designated the presentor, he may assist the presentor in preparing the evidence against the superintendent, but at the hearing he is not to assist the presentor in putting on the case against the superintendent. At the hearing the school attorney is to serve as the law officer who advises the board and the other parties on questions of law.

Option 2. The school board attorney may either (a) present or help present the charges and evidence to support the charges against the superintendent, or (b) serve as legal adviser to the board and law officer at the hearing. He may not perform both functions. If the school attorney performs the prosecutorial role of putting on the evidence against the superintendent, the board may obtain other counsel to advise it and the other parties on questions of law concerning the discharge that arise before, during, and after the hearing. If the board attorney does not put on or assist in the presentation of the case against the superintendent, he shall serve as legal adviser to the board and answer all questions of law that may arise before, during, and after the hearing.

Comment: See the comment to Section 25 of the teacher discharge code (Code III) for a discussion of challenges to some of the ways in which school board attorneys have participated in student expulsion and teacher discharge hearings. To avoid unnecessary litigation and possible reversal of board action over the proper role of the board attorney, the prosecutorial and abjudicatory functions should be separated at the hearing. Both options provide for this separation at the hearing, and Option 2 requires separation at all stages of the dismissal. My preference is Option 1 when the board attorney has not been designated the presentor. It provides for separation at the critical hearing stage, where the presentor should put on the case for dismissal while the board attorney serves as a law officer, answering questions and giving advice to the board of education.

Section 20. *Disposition of the Case.* The school board shall decide by a majority vote whether the grounds for the discharge are true and substantiated. If it finds that the grounds *are* true and substantiated, the board shall determine by majority vote whether dismissal or some other disciplinary action is warranted.

The board's decision shall rest solely on the evidence properly presented at the hearing. It shall in a written report briefly summarize the evidence, make findings of fact based thereon, and set forth its decision. The presiding officer, or his designee, shall write the report and order of the board, and a copy shall be delivered to the superintendent.

If the board determines that the grounds are not supported by substantial evidence, the matter is terminated and no further attempt to discharge may be taken against the superintendent on the basis of these charges unless new evidence becomes available. But a board finding that the grounds are not supported by substantial evidence does not preclude an attempt by the board to buy up the superintendent's contract.

> **Comment:** The requisites of a fair hearing are a finding based only on the evidence presented at the hearing and on the applicable legal rules. While the rules governing the admissibility of evidence in a court of law are not applicable to the dismissal hearing, the board must determine the weight of the evidence and must consider only reliable evidence.

Form 3 in the Appendix is a proposed form for the findings and order of the board.

Code VI

Dismissal of an Assistant or Associate Superintendent with a Contract for a Specified Term

Assistant and associate superintendents typically are excluded from the application of teacher tenure acts. In most states these administrators, like the superintendent, serve at the board's pleasure. However, in a growing number of states, school boards are appointing them for a specified term—a requirement of some states' statutes, including North Carolina's.[46] These boards of education need to specify the grounds and procedure for discharging these administrators for cause before the end of the contract period. The following code sets out grounds and procedures for dismissal that can be adopted by any school board as long as it is sure that the code does not conflict with any statutory requirement or state board policy.

Some states' statutes, including North Carolina's, require that the tenure act procedure for discharging a tenured teacher be used when an assistant superintendent is to be discharged in the middle of a contract. Thus the procedure set out in Code III for discharging a teacher must be followed in North Carolina. Boards in states that do not specify an established procedure should use the procedure recommended in Code V for dismissing the superintendent.

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46. G.S. 115C-278 provides that school boards may, on the recommendation of the superintendent, appoint assistant and associate superintendents for a term of from one to four years, but the term may not run longer than the expiration date of the superintendent's contract unless the remaining time of his contract is less than one year. If there is less than one year remaining on the superintendent's contract, the assistant or associate superintendent shall be given a contract through the next school year.

A. Basis for Dismissal

Section 1. *Permissible Basis for Dismissal.* An associate or assistant superintendent[47] of the _____ School Administrative Unit may be dismissed during the contract period for one of the following reasons:

(a) Misconduct indicating that he is unfit to continue in his position;
(b) Incompetence;
(c) Neglect of duty; or
(d) Failure or refusal to carry out validly assigned duties.

Comment: The North Carolina statute G.S. 115C-278 sets out four basic grounds for dismissing an assistant superintendent during the contract period. This provision restates the statutory grounds for dismissal. This code does not apply to the nonrenewal of a content. The board of education may refuse to renew an assistant superintendent's contract for any reason it deems sufficient, and it need give no reason or explanation.

B. Procedure for Dismissal

Section 2. *Initiating the Dismissal.* (Superintendent's Investigation). The superintendent has the initial responsibility in dismissing an assistant superintendent. If he or the board of education has information about an assistant superintendent that is a basis for dismissal and if he or the board thinks that dismissal is an appropriate action if the charges are true, the superintendent shall investigate the charges and review all available information.

The investigation shall include an interview with the assistant superintendent at which he shall be permitted to raise any defense he thinks relevant. Before beginning the interview, the superintendent shall advise the assistant superintendent of the purpose of the interview and the charges against him. If the assistant superintendent requests that other witnesses be questioned, the superintendent shall interview them if possible.

Comment: The superintendent's investigation is intended to be informal and to give him a basis for reaching a preliminary determination about whether the charges are valid and whether dismissal is the appropriate action. Since assistant superintendents work directly with the board of education, this section does not leave dismissal solely to

47. Hereinafter, the term assistant superintendent shall be used to refer to either or both an associate or assistant superintendent.

the superintendent's discretion. The superintendent is required to investigate and report to the board if the board has information that would constitute a basis for dismissal and directs him to investigate.

Section 3. *Superintendent's Recommendation.* After completing his investigation, the superintendent shall report his findings to the board. His report shall list the charges made against the assistant superintendent and summarize the evidence that substantiates or refutes those charges. It may but need not include a recommendation as to whether dismissal is warranted.

Section 4. *Decision to Dismiss.* Within fourteen days after receiving the superintendent's report, the board of education shall decide whether to dismiss the assistant superintendent.

Comment: The decision to dismiss the assistant superintendent rests with the board; it need not follow the superintendent's recommendation, if any.

Section 5. *Procedure for Dismissal. . . .*

Comment: As the introduction to this code noted, several states, including North Carolina, require that the procedure specified in the state tenure act for discharging a tenured teacher be used when a school board seeks to discharge an assistant superintendent. In North Carolina the procedure set out in Code III for discharging a teacher must be followed. In states that do not specify a procedure, the procedure for giving notice and conducting a dismissal hearing set out in Sections 4 through 19 for discharging the superintendent (Code V) should be the procedure followed in dismissing an assistant superintendent. The superintendent should perform the duties of the investigator and presentor provided for in this procedure.

Appendix

Forms To Be Used in Dismissal or Nonrenewal Proceedings

This appendix includes forms that may be used in notifying the teacher about actions contemplated or taken in the dismissal or nonrenewal-of-contract procedure by the superintendent or the board of education. Use of these forms is not required, but using them will help assure compliance with state law.

FORM 1

Notice of Nonrenewal of a Nontenured Teacher's Contract

To: _____
(Teacher's name and position in school system)

Please be advised that your contract with the _____ Board of Education terminates at the end of the current school year and the contract will not be renewed.

If you would like a conference with your principal and the superintendent on why your contract will not be renewed, please notify the superintendent in writing that you request such a conference.

_____ _____
(date) (chairman)

cc: Superintendent and teacher's principal

[Note: This notice should be delivered to the teacher or sent to him by certified mail, return receipt requested.]

Appendix

FORM 2

Superintendent's Notice to Teacher of Recommendation to Dismiss

To: _____
(Teacher's name and position in school system)

1. Please be advised that I, _____, as superintendent of the _____, plan to recommend to the _____ Board of Education that you be dismissed effective _____ for the following reasons:

(Describe here the charges in detail.)

2. Three options are available to you.

Option One. You may, within fifteen days after receiving this notice, request a review by a five-member panel appointed by the State Superintendent of Public Instruction from the Professional Review Committee. A list of this committee's members is enclosed. You have the right to appear with counsel before this panel and present any evidence on the charges listed above. After the panel review, you may request a hearing before the board of education.

If you request a panel review, you may eliminate from consideration as a member of your panel up to 30 members of the Professional Review Committee. Please strike through any names (up to 30) on the enclosed list of Committee members that you choose to eliminate from consideration for your panel and return this list with your request for the panel. You also may request that at least two of the five panel members be from your professional peer group. You may so choose by checking the appropriate box at the bottom of the list of Professional Review Committee members. Please sign and date the list and return it to me.

Option Two. If you prefer not to have the panel review the superintendent's recommendation, you may, within fifteen days after receiving this notice, request a hearing before the board of education. You will have the right to appear with counsel before the board and to present any evidence on the charges listed above.

Option Three. You may do nothing. If you do not request a panel review or school board hearing within fifteen days after receiving this notice, you waive your right to either hearing. The board of education may then act on the superintendent's recommendation, which may result in your dismissal or demotion.

If you do not reply within fifteen days after receiving this notice, this office will assume that you have chosen Option Three.

3. A copy of the board's procedural code, a copy of the teacher tenure

statute (G.S. 115C-325), and a current list of the members of the Professional Review Committee are enclosed.

_____ _____

(date) (signature of superintendent)

[Note: This notice must be sent to the teacher by certified mail, return receipt requested.]

FORM 3

Board's Notice to Teacher of Recommendation to Dismiss

To: _____

(Teacher's name and position in school system)

Please be advised that the _____ Board of Education has received a recommendation from the superintendent that you be dismissed (demoted to _____; suspended without pay for thirty days.). A copy of the superintendent's recommendation and a copy of the review panel's report are enclosed.

If you desire a hearing before the board on the recommended dismissal (demotions; suspension), you must notify the board within ten days after you receive this notice.

_____ _____

(date) (chairman)

[Note: This notice must be sent to the teacher by certified mail, return receipt requested.]

Appendix

FORM 4

Findings and Order of the Board of Education

To: _____
(Teacher's name and position in school system)

Please be advised that the _____ Board of Education hereby dismisses (demotes) you on the basis of the following charges, which it finds to be true and substantiated. A summary of the evidence presented before the board of education follows each listed charge.

[List each charge and summarize the evidence that substantiates it.]

(Alternative Paragraph: Please be advised that the _____ Board of Education finds the charges unsubstantiated and dismisses the charges against you.)

This decision rests solely on the evidence presented at the hearing before the school board.

The board hereby orders that you be:

___ (a) Dismissed.

___ (b) Demoted from the position of _____ to the position of _____.

___ (c) Demoted by being reduced in compensation in the amount of _____. [In North Carolina this alternative applies only to local supplement money.]

___ (d) Reinstated and continued in the employment of the school system in the same position held before this action and at the same rate of compensation.

_____ _____
(date) (chairman)

cc: Superintendent's Office

[Note: This notice should be delivered to the teacher by hand or sent to him by certified mail, return receipt requested.]

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